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No.

In The

Supreme Court of the United States

October Term, 1998

MT. HOPE ASPHALT CORP. a/k/a MOUNT HOPE ASPHALT CORP. and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

vs.

MICHAEL ZAGATA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a state prohibition against the recycling in state of petroleum-contaminated soil from out of state constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United State Constitution.

II. Whether a state prohibition against the recycling in state of petroleum-contaminated soil from out of state, applied to respondents but not to their competitors, constitutes a violation of the Equal Protection Clause of the United State Constitution.

PARTIES TO THE PROCEEDING

Petitioner Mt. Hope Asphalt Corp. has no parent or subsidiary corporations.

Petitioner Barbara Petrosky is the widow of Frank Petrosky, formerly the President of Mt. Hope Asphalt Corp. and a party hereto, and participates in this proceeding as the Executrix of his estate.

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INTRODUCTION

Petitioners, Mt. Hope Asphalt Corp. and Barbara Petrosky, Executrix of the Estate of Frank Petrosky, respectfully request that a writ of certiorari be issued to review the decision and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered in this case. (For the convenience of the Court, both petitioners will hereinafter be referred to collectively as "Mt. Hope.")

OPINIONS BELOW

The decision and judgment of the Supreme Court, Appellate Division, Second Judicial Department of the State of New York, was rendered on March 16, 1998. That decision is reported at 669 N.Y.S. 2d 874 (2d Dep't 1998) and appears at page 1a in the Appendix to this petition. ("Pet. App.".) The decision of the Court of Appeals of the State of New York denying Mt. Hope's motion for leave to appeal, rendered on July 9, 1998, is reported at 1998 N.Y. Lexis 2261, and is reproduced at Pet. App., page 124a.

The June 6, 1996 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Nassau, which transferred the proceeding to the Appellate Division, Second Department, is unreported and is reproduced at Pet. App., page 5a.

The determination of Respondent, New York State Department of Environmental Conservation, which is the object of review in these proceedings, was rendered on September 7, 1995, is unreported and is reproduced at Pet. App., page 112a.

STATEMENT OF JURISDICTION

The decision and judgment of the Supreme Court, Appellate Division, Second Department of the State of New York, was

issued on March 16, 1998. An order denying petitioners' timely motion for leave to appeal was issued by the Court of Appeals of the State of New York on July 9, 1998. The time within which to file this petition extends to October 7, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution reads in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

U.S. Const., art. I, § 8, cl. 3.

The Equal Protection Clause of the 14th Amendment of the United States Constitution reads in pertinent part:

> No state shall deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV.

The Resource Recovery and Conservation Act (RCRA) provides in pertinent part:

> The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . promoting a national research and development program for improved solid waste management and

> resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues.

42 U.S.C. § 6902(a)(9).

STATEMENT OF THE CASE

The fundamental issues presented to the Court for determination in this case deal with the innovative recycling process of utilizing petroleum-contaminated soil in the production of asphalt, and the ban by the State of New York on Mt. Hope's utilization of petroleum-contaminated soil from beyond the borders of New York State. This prohibition burdens interstate commerce in an unconstitutional manner. Moreover, New York State's allowance of Mt. Hope's competitors to utilize out-of-state contaminated soil in their asphalt process constitutes unequal treatment of Mt. Hope in violation of the Equal Protection Clause of the Fourteenth Amendment.

To understand the context in which these issues arise in this case, a brief description of the development of the recycling process and the proceedings below is necessary.

A. The Recycling Of Petroleum-Contaminated Soil

In 1976, Congress enacted the Resource Conservation and Recovery Act — "the comprehensive federal statute regulating waste, 'to reduce the amount of waste and unsalvageable materials.' " Philip Weinberg, *Congress, the Courts, and Solid Waste Transport: Good Fences Don't Always Make Good Neighbors*, 25 Envtl. L. 57, 58 (1995) (quoting Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4)).

It was the first federal statute to declare the recycling of wastes as a paramount public policy. Similarly, the State of New York in 1972 adopted a strong public policy in favor of recycling (ECL 3-0301) and today there is widespread public support of waste recycling wherever feasible. Working with New York State Department of Conservation, Mt. Hope developed a process to utilize petroleum (*e.g.*, gasoline) contaminated soil in the manufacture of asphalt for roads and highways. The proliferation of leaking gasoline tanks throughout the country has created a national crisis, and use of the gasoline-contaminated soil in the manufacture of useable asphalt enabled Mt. Hope and the State of New York to take a hazardous waste and recycle it into a useable product.

In and around 1990 the DEC and petitioners jointly assessed the feasibility of this new recycling process and jointly conducted tests to determine its feasibility. In 1991, petitioners' facility was modified with the approval of New York State in order to recycle petroleum-contaminated soil, and operations were undertaken in late 1991. From August 1991 to September 1992, Mt. Hope worked with the State of New York in making this new process functional. In June of 1992, the State of New York advised Mt. Hope that it was prohibited by the State from transporting petroleum-contaminated soil from New Jersey into New York and from utilizing out-of-state materials in its asphalt production. (While this alleged prohibition was contested by Mt. Hope, it has been upheld by the decision of the New York State Department of Environmental Conservation, and affirmed by the Court decisions below. As a result, Mt. Hope has proceeded here on the basis that it had at all times been prohibited by New York State from utilizing out-of-state contaminated soil in its in-state asphalt manufacturing process.)

Mt. Hope did utilize many tons of petroleum-contaminated soil emanating from New Jersey on at least 36 occasions, for

which the Department has revoked its permit to operate its asphalt plant. The Department concluded that these 36 shipments of contaminated soils from New Jersey to Mt. Hope's Long Island plant, and their subsequent utilization in the asphalt manufacturing process, constituted violations of the New York State Environmental Conservation Law Articles 19 and 27, and 6 NYCRR Part 360. The Administrative Law Judge, after a two-week trial, concluded that in 35 of the 36 occasions when Mt. Hope received New Jersey petroleum-contaminated soil, the material received was of the same "kind and quality authorized to be processed at the facility but for the fact the material originated in New Jersey, rather than New York." (Pet. App., page 96a.)

In addition, Mt. Hope proffered evidence at the hearing that the State of New York had approved a request from one of Mt. Hope's competitors to utilize out-of-state petroleum-contaminated soil in its asphalt manufacturing process, while such use was simultaneously denied to Mt. Hope. While the evidence was not received by the Administrative Law Judge, the Respondent State of New York has conceded the point. (Respondents Brief in the Appellate Division, p. 40.)

As will be seen from a description of the proceedings which took place below, neither the New York State Department of Environmental Conservation, nor the Supreme Court of Nassau County, nor the Appellate Division, Second Judicial Department, nor the New York State Court of Appeals addressed Mt. Hope's claims that the actions of the State of New York had violated its rights under the Commerce Clause and the Equal Protection Clause (except possibly for the statement at the conclusion of the decision of the Appellate Division that "we have reviewed the petitioners' remaining contentions and find them to be without merit").

B. The Proceedings Below

After a two-week trial addressing Mt. Hope's alleged violations of its permit restrictions regarding "foreign" soil, the New York State Department of Environmental Conservation revoked Mt. Hope's permit to operate its asphalt plant, principally because of its use of contaminated soil which originated in New Jersey, purportedly in violation of the requirements of the State of New York and Mt. Hope's permit. Mt. Hope has not operated since 1992. The New York State Department of Environmental Conservation did not address Mt. Hope's constitutional claims, although they were made part of the record. In seeking judicial review of this determination of the New York State Department of Environmental Conservation, Mt. Hope asked the Supreme Court, Nassau County, to set it aside, *inter alia*, because of New York State's unconstitutional discrimination against interstate commerce and its unconstitutional treatment of Mt. Hope. The lower court transferred the proceeding directly to the Appellate Division, Second Judicial Department, which upheld New York State's determination, without addressing specifically either of Mt. Hope's constitutional issues.

The Court of Appeals declined to hear an appeal from the Appellate Division.[1] As noted, none of the three Courts which reviewed this matter below addressed Mt. Hope's constitutional claims on their merits. Because these constitutional issues are serious and substantial, because they implicate the national societal goal of recycling in a deleterious manner, and because Mt. Hope has not yet received an airing of its constitutional grievances, it is respectfully submitted that the issues should be addressed by this Court.

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1. This is the same procedure that resulted in the United States Supreme Court's invalidation of a New York flow control ordinance: *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994).

REASONS FOR GRANTING THE WRIT

This case presents an issue that has divided the lower courts for the last twenty years: the extent to which a state, consistent with the Commerce Clause, may properly restrict or prohibit the importation of contaminated materials across its borders. Because the contaminated material in this case was being recycled into a useable product, its ban has societal implications in addition to constitutional ones.

New York State limited Mt. Hope to using "New York" petroleum-contaminated soil in its asphalt manufacturing process, banning the importation of "New Jersey" contaminated soil of identical composition. The effect was to prevent generators of waste in New Jersey, including the United States Government, from benefiting from Mt. Hope's innovative recycling process, while at the same time reducing Mt. Hope's ability to keep its recycling process functioning. The only alternative to recycling is the disposal of the waste at a costly hazardous waste disposal site, thereby dramatically increasing the cost of disposal and at the same time creating an additional environmental problem.

After barring Mt. Hope from importing petroleum-contaminated soil from New Jersey, the State of New York authorized one of Mt. Hope's competitors to import and utilize such "New Jersey" soil, thereby violating Mt. Hope's rights under the Fourteenth Amendment of the United States Constitution to equal protection of the law.

For all of these reasons, and particularly because the states and the lower courts need guidance on the constitutionality of such import bans, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

I.

AS WITH FLOW CONTROL LAWS, STATE REGULATION OF THE IMPORTATION OF ENVIRONMENTALLY SENSITIVE MATERIAL HAS RECEIVED UNEVEN TREATMENT FROM THE LOWER COURTS, IS OF NATIONAL IMPORTANCE AND SHOULD BE ADDRESSED BY THE COURT.

Just as with flow control laws prior to and even subsequent to this Court's decision in *C. & A. Carbone v. Town of Clarkstown*, the lower courts have continued to grapple with the issue of whether and under what circumstances states may discriminate against environmentally sensitive material such as petroleum-contaminated soil generated beyond its borders.

The dormant Commerce Clause has been construed as the constitutional "restrict[ion on] the states (or their subdivisions) from either unduly burdening interstate commerce or discriminating against it." Weinberg, *supra* at 59. However, for purposes of *stare decisis*, a review of the relevant case law does not provide states or their citizens with a facile way of distinguishing between measures which are legitimate exercises of a state's police power, those which result in only "incidental" burdens on interstate commerce, and those which are *per se* invalid. In spite of a line of cases which holds that importation bans without justification violate the Commerce Clause, the test to be applied remains unsettled. Because a court's characterization of a challenged regulation dictates the level of judicial scrutiny to be employed, and because in the absence of established criteria there is substantial disagreement among the courts as to the process of characterization, guidelines from this Court would further the principle of *stare decisis* by providing definite, fixed, settled standards on which states could rely.

A. Test for Violation of the Commerce Clause.

The test employed was established by this Court in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727 (1979). As set forth by the Court, analysis of a state policy alleged to violate the Commerce Clause requires inquiry as to

> (1) whether the challenged [policy] . . . regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the [policy] . . . serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

See Weinberg, *supra* at 59 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Statutes which only incidentally impact interstate commerce will be upheld "unless the burden imposed . . . is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree." *Id.* at 60 n.15 (citing a similar test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970)). As illustrated, there is considerable ambiguity as to whether discriminatory environmental measures are *per se* invalid or merely have "incidental" impact; whether local environmental protectionism justifies discriminatory measures which restrict interstate import or export of waste; and what level of judicial scrutiny is warranted.

B. Per Se Invalidity.

In *Carbone*, the Supreme Court struck down a ban on the export of waste and held that

> discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has *no other means* to advance a legitimate local interest.

511 U.S. 383, 392, 114 S. Ct. 1677, 1683 (1994) (citations omitted) (emphasis added).

Similarly, in *SSC Corp. v. Town of Smithtown*, the Second Circuit Court of Appeals struck down an ordinance which required that all garbage generated within the town be disposed of at the town incinerator, citing *City of Philadelphia*'s "virtual per se rule of invalidity" of state regulations that discriminate against interstate commerce. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509 (2d Cir. 1995) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535 (1978)).

C. *Pike*'s Balancing Test.

Alternatively, some jurisdictions subject regulations which affirmatively discriminate against interstate commerce to "heightened," rather than "rigorous," scrutiny. The burden of proof is placed on the defendant to establish that "there are no feasible nondiscriminatory alternatives to meet the legitimate state purposes." *Atlantic Coast Demolition v. Chosen Freeholders*, 931 F. Supp. 341, 354 (D.N.J. 1996).

In applying this standard in a situation strikingly similar to Mt. Hope's, the court in *In re Southeast Arkansas Landfill, Inc.*, 981 F.2d 372 (8th Cir. 1992), found that the state had not demonstrated that out-of-state waste was more harmful than in-state waste. Balancing *Pike's* consideration of legitimate state interests, the court struck down the state regulatory scheme because the burden on interstate commerce "was clearly

excessive in relation to putative local benefits." This decision reversed a lower court's determination that, although the importing of out-of-state waste was restricted, the regulatory scheme served a legitimate purpose of protecting the environment. *In re Southeast Arkansas Landfill, Inc.*, 137 B.R. 735 (E.D. Ark. 1992).

Similarly, in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566, (D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994), the court determined that, in spite of a legitimate local purpose, an ordinance's requirement that all out-of-state disposals be reported had a practical discriminatory effect on interstate commerce and hence violated the Commerce Clause.

Furthermore, the Second Circuit found no violation of the Commerce Clause based on a rational relationship between the law and the state's interest. In *New York State Trawlers Association v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994), the court held that a law which prohibited trawlers from taking lobsters from Long Island Sound did not violate the Commerce Clause because it did not discriminate against non-residents and only imposed an *incidental burden* on interstate commerce which was "rationally related to advancing a legitimate state interest."

Viewed as parts of a quilt which together should comprise a seamless whole, it appears that the lower courts are confused as to the proper standard to be applied in evaluating the constitutionality of state laws and policies regulating or banning the importation of environmentally sensitive material. Guidance from this Court will help the lower courts address this national societal concern.

II.

POLICIES SUCH AS NEW YORK'S BANNING THE IMPORTATION OF PETROLEUM-CONTAMINATED SOIL FROM OUT OF STATE BURDEN AND DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Mt. Hope was found to have violated the state-imposed conditions of its permit to recycle petroleum-contaminated soil when over a 10-month period and on 36 separate occasions it received and processed petroleum-contaminated soil from New Jersey. Was it because this soil was different or more dangerous or less controlled than identical material originating in New York? No.

The ALJ found that on practically every occasion when Mt. Hope received New Jersey petroleum-contaminated soil, the material received was of the same "kind and quality authorized to be processed at the facility but for the fact that material originated in New Jersey, rather than New York." (Pet. App., page 96a.)

There are no findings by the Department that Mt. Hope undertook *any* acts which endangered the environment or in any way circumvented the technical procedures set forth in its Permit for accepting petroleum-contaminated soil or processing that soil. Because of the lack of any environmental impact from Mt. Hope's receiving and properly processing this material, the ALJ viewed these violations to be "*de minimis*." (Pet. App., pages 96a-97a.)

It is respectfully submitted that New York State's policy which barred Mt. Hope from importing petroleum-contaminated soil from the State of New Jersey, while at the same time identical to that which it received and processed from within

the State of New York, constitutes a burden upon interstate commerce and a *per se* violation of the Commerce Clause.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have [p]ower . . . [t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. 1 § 8, cl. 3. When read literally, it consists of an affirmative grant of power to Congress. This Court, however, has long interpreted the Commerce Clause "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. at 326, 99 S. Ct. 1727 (1979).

The Commerce Clause "directly limits the powers of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992). "Discrimination" is defined by the Court as the

> differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid (citation omitted).

Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994). This "negative" or "dormant" component of the Commerce Clause is designed to "prohibit economic protectionism" by states (*Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992), and to "foster the development of a unified national market." *SSC Corp. v. Town of Smithtown*, 66 F.3d at 509.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 97 S. Ct. 2434, 2446 (1977),

this Court stated that "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. at 337, 99 S. Ct. at 1737.

On a number of occasions, the Court has considered state "bans" on the importation of "articles of commerce" from other states. In almost every instance, the Court has struck down such bans on the ground that they violate the Commerce Clause.

For example, in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978), the New Jersey Legislature had enacted a statute which banned the importation of out-of-state waste for disposal at New Jersey landfills. Philadelphia and several other cities which had agreements with operators to dispose of their waste at New Jersey landfills sued the State of New Jersey, alleging that the statute violated the Commerce Clause. This Court struck the New Jersey statute as unconstitutional, holding that "waste" is an "article of commerce" for purposes of analysis under the Commerce Clause. The Court further ruled that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622.

Similarly, waste import restrictions of Michigan's Solid Waste Management Act were held to discriminate against interstate commerce. *Ford Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. Natural Resources*, 504 U.S. 353, 112 S. Ct. 2019 (1992). Michigan claimed that the restrictions were necessary to enable individual counties to make adequate plans

for the safe disposal of future waste. *Id.* at 366, 112 S. Ct. at 2027. However, the Supreme Court ruled that Michigan had failed to provide any legitimate reason for allowing petitioner to accept waste from inside the county but not waste from outside the county. *Id.* at 361, 112 S. Ct. at 2024; *see also, In re Southeast Arkansas Landfill, Inc. v. State of Arkansas, Dep't of Pollution Control & Ecology*, 981 F.2d 372 (8th Cir. 1992).

In *Dennis v. Higgins*, 498 U.S. 439 (1991), this Court held that rights granted under the Interstate Commerce Clause are individual rights enforceable by those injured by state action:

> It is also clear, however, that the Commerce Clause does more than confer power on the Federal Government; it is also a substantive "restriction on permissible state regulation" of interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S. Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240, 81 L.Ed.2d 71 (1984). In addition, individuals injured by the state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. *See*, e.g., *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco Dept. of Business Regulations of Florida*, 496 U.S. 18, 31, 100 S. Ct. 2238, 2247, 100 L.Ed.2d 17 (1990). *Id.* at 447.

Recently, the United States Court of Appeals for the Second Circuit, in *SSC v. Smithtown*, *supra*, struck down an ordinance enacted by the Town of Smithtown which required that all

residential and commercial garbage generated in the Town be disposed of at the incinerator jointly financed by the Town of Smithtown and the Town of Huntington. In its ruling in favor of the plaintiff challenging the regulatory scheme, the Second Circuit stated that state regulations that discriminate against interstate commerce are subject to a "virtual per se rule of invalidity (citations omitted)." *Id.* at 509. *See also*, *C. & A. Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994).

Mt. Hope was the first facility in New York to seek and obtain approval to engage in the environmentally sound concept of taking a waste product — petroleum-contaminated soil — and recycling that waste into a useful product — asphalt. It taught the DEC how this recycling process could work, and soon other asphalt plants had followed Mt. Hope's lead. Demonstrating that the process could be implemented using either "New York" or "foreign" contaminated soil, in 1992 the Department authorized one of Mt. Hope's competitors to receive petroleum-contaminated soil from the State of New Jersey. (See Respondents Brief in the Appellate Division, p. 40.)

It is respectfully submitted that since the Department has authorized one asphalt manufacturer to receive petroleum-contaminated soil from New Jersey, it can hardly claim that there exists a health or other compelling governmental reason to bar Mt. Hope from doing likewise. Since it can thus provide no "demonstrable justification" for such a position, any alleged permit prohibition which precluded Mt. Hope from receiving New Jersey soil constitutes a *per se* discrimination against interstate commerce and, therefore, is invalid under the Commerce Clause of the United States Constitution.

III.

IN ADDITION TO NEW YORK'S VIOLATION OF THE COMMERCE CLAUSE, ITS PROHIBITION AGAINST MT. HOPE RECEIVING SOIL FROM THE STATE OF NEW JERSEY IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court summarized the protection granted under the Equal Protection Clause as follows:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyer v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed. 2d 786 (1982). *Id.* at 439.

Lawrence H. Tribe in his treatise, "American Constitutional Law," *Foundation Press* (1978), states:

> Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent the compelling government justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights. *Id.* at 1002.

In *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865 (1991), the Court held that the Commerce Clause confers upon an individual the right to engage in interstate trade free from restrictive state regulation:

The court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In *Crutcher v. Kentucky*, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated:

> To carry on interstate commerce is not a franchise or privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.

Id. at 57. Similarly, *Western Union Telegraph Co. v. Kansas, ex rel. Coleman*, 216 U.S. 1, 26, 30 S.Ct. 190, 1907, 54 L.Ed. 355 (1910), referred to the "substantial rights of those engaged in interstate commerce." And *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed. 2nd 562 (1967) declared that engaging in interstate commerce is "a righ[t] of constitutional stature." *Id.* at 448.

Based upon the foregoing, it is respectfully submitted that the unequal treatment by a state in affording one company the right to engage in interstate commerce while depriving a similarly situated company from engaging in the very same interstate commerce constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, unless the state can demonstrate a *compelling* reason for the discrimination. No such compelling reason has been shown here.

Although respondents concede that New York has permitted a competitor of Mt. Hope to utilize "New Jersey"

soil while Mt. Hope has been shut down because it processed the same soil, respondents claim that this divergent treatment does not constitute a violation of the Equal Protection Clause of the United States Constitution.

Realizing the weakness of their position that no discrimination occurred, respondents assert that if the Court finds a discriminatory act, it should apply the "rational basis test," rather than the "strict scrutiny test" in analyzing whether New York has violated Mt. Hope's Equal Protection Clause rights. To the contrary, Mt. Hope relies upon Professor Tribe's analysis and this Court's decision in *Dennis v. Higgins*, *supra*, in asserting that its right to engage in interstate commerce is a "fundamental right" under the United States Constitution, the deprivation of which under Equal Protection jurisprudence gives rise to the use of the "strict scrutiny test" and not the "rational basis test" as suggested by respondents. Application of the "strict scrutiny test" mandates that petitioners' equal protection rights have been violated.

However, even if this court were to apply the "rational basis test," the result would be the same. Respondents rely on their "myth of DEC spill numbers" to establish that they acted reasonably. As this myth is not supported by the record, respondents are left without a rational basis for their discriminatory treatment of Mt. Hope. Based upon the foregoing, it is respectfully submitted that New York's ban on Mt. Hope's use of "foreign" contaminated soil, when others similarly situated are allowed to utilize such "foreign soil," constitutes a violation of the Equal Protection Clause of the United States Constitution and should be rectified by this Court.

CONCLUSION

This case presents a question of significant national importance — whether and under what conditions a state may ban the importation of environmentally sensitive material intended for recycling into a useable product, as well as the corollary question of whether a prohibition to one citizen can be justified in light of a grant to a similarly situated citizen.

The flow of environmentally sensitive material across state borders has received heightened attention nationally because of our concern with protection of the environment balanced against our desire to recycle contaminated material. In this case, petitioner has proposed to recycle petroleum-contaminated soil into useable asphalt, utilizing soil originating from within New York State as well as from without, and the State has prevented it from doing so. This type of state action clearly implicates the Commerce Clause and the Equal Protection Clause of the United States Constitution and presents to this Court the opportunity to provide local governments, the regulated community and the lower courts with appropriate guidelines to foster both societal goals — protection of the environment and encouragement of recycling — all within a constitutional framework.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANDREW J. SIMONS
Counsel of Record
SANFORD STRENGER
FARRELL FRITZ, P.C.
Attorneys for Petitioners
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Uniondale, New York 11556
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APPENDIX A — DECISION AND JUDGMENT OF THE SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT FILED MARCH 16, 1998

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

AD2d
Argued — October 27, 1997

___ AD2d ___

MYRIAM J. ALTMAN, J.P.
WILLIAM D. FRIEDMANN
GABRIEL M. KRAUSMAN
LEO F. McGINITY, JJ.

96-08219

In the Matter of Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp., and Barbara Petrosky, as Executrix of the Estate of Frank Petrosky, petitioners, v. Michael Zagata, etc., et al., respondents.

* * *

DECISION & JUDGMENT

Proceeding pursuant to CPLR article 78, *inter alia,* to review so much of a determination of the Commissioner of the Department of Environmental Conservation as, *inter alia,* after

a hearing, determined that the petitioners violated Environmental Conservation Law 27-0707, 6 NYCRR 360-1.7, and Navigation Law 173 and 175, and imposed penalties and fines against them, denied the application of the petitioner Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp., for a certificate to operate an afterburner, and revoked the permit of the petitioner Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp., to construct and test a rehydration chamber.

ADJUDGED that the determination is confirmed insofar as reviewed and the proceeding is dismissed, on the merits, with costs.

In order to annul an administrative determination made after a hearing, a court must conclude that the record lacks substantial evidence to support the determination *(see, Matter of Pell v. Board of Educ.*, 34 NY2d 222, 231). The petitioners' contention that the determination of the Commissioner of the Department of Environmental Conservation (hereinafter the DEC) was not supported by substantial evidence is without merit. The testimony of the witnesses for the DEC established the facts necessary to sustain the charges that the petitioners had violated Special Conditions 4.13 and 5.13 of the permit, had discharged petroleum at the Mt. Hope facility in violation of the Navigation Law, and are unfit and unsuitable to hold DEC permits. The penalties imposed were not so disproportionate to the offenses committed as to be shocking to one's sense of fairness *(Matter of Pell v Board of Educ., supra).*

March 16, 1998

Appendix A

We have reviewed the petitioners' remaining contentions and find them to be without merit.

ALTMAN, J.P., FRIEDMANN, KRAUSMAN and McGINITY, JJ., concur.

Appendix A

96-082119

DECISION & ORDER ON MOTION

In the Matter of Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp., and Barbara Petrosky, as Executrix of the Estate of Frank Petrosky, petitioners, v Michael Zagata, etc., et al., respondents.

Motion by the petitioners in a proceeding pursuant to CPLR article 78 which was transferred to this court by order of the Supreme Court, Nassau County, entered June 6, 1996, to substitute as a petitioner Barbara Petrosky, as the executrix of the estate of the deceased petitioner Frank Petrosky.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the motion is granted, and the caption of the above-entitled case is amended accordingly.

ALTMAN, J.P., FRIEDMANN, KRAUSMAN and McGINITY, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 16, 1998

APPENDIX B — ORDER OF TRANSFER, ENTERED JUNE 6, 1996

SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: HON. THOMAS A. ADAMS

JUSTICE
TRIAL/IAS, PART 20
NASSAU COUNTY

INDEX NO. 32468/95

MT. HOPE ASPHALT CORP., et al

Plaintiff(s),

- against -

MICHAEL ZAGATA, et al

Defendant(s).

* * *

This is an Article 78 proceeding wherein petitioner sets forth a question specified in CPLR 7903(4) i.e., whether the determination which was made as a result of a hearing was supported by substantial evidence (see decision and order dated September 7, 1995, annexed as Exhibit A to the order to show cause). Respondent has moved to dismiss the first, second, fourth and sixth causes of action by raising "objections in point of law" pursuant to CPLR 7804(f).

Appendix B

Upon consideration of the record submitted, this Court finds that the determination of the objections raised by the respondent will not terminate this proceeding. [CPLR 7804(g).]

Accordingly, pursuant to the provisions set forth in CPLR 7804(g), this matter should be transferred to the Appellate Division for disposition of the substantial evidence issue and all other issues raised in this proceeding.

In view of the foregoing, respondent is directed to serve and file an answer within twenty (20) days from the date of this order and upon filing such answer, the matter will be remitted to the Appellate Division, Second Department.

DATED MAY 31, 1996

s/ [illegible]
J.S.C.

APPENDIX C — DECISION AND ORDER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DATED SEPTEMBER 7, 1995

STATE OF NEW YORK:

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Consolidated Hearing In the Matter of Alleged Violation of Articles 19 and 27 of the New York Environmental Conservation Law and Parts 201, and 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and Proceedings to Revoke All Permits Now Held by and Deny All Applications for Permits Filed by,

DEC. Nos. 1-5445-93-09,
1-4722-01052/00003-0,
1-4722-01052/00004-0,
AND
BENEFICIAL USE DETERMINATION

MT. HOPE ASPHALT CORP., a/k/a MOUNT HOPE ASPHALT CORP.

and

FRANK PETROSKY, Individually,, and In His Capacity as an Officer of MT. HOPE ASPHALT CORP., a/k/a MOUNT HOPE ASPHALT CORP.,

Respondents.

Appendix C

DECISION AND ORDER

WHEREAS:

1. Staff of the Region 1. Office of the New York State Department of Environmental conservation ("Staff") duly served a Notice of Hearing and Complaint upon Respondents, thereby initiating an administrative enforcement hearing. Separately, Staff issued a notice of intent to revoke a permit held by Respondent Mt. Hope Asphalt Corp. ("Mt. Hope"), revoke a Beneficial Use Determination issued to Mt. Hope and deny its application for permit renewal.

2. Pursuant to a ruling by Administrative Law Judge ("ALJ") Kevin J. Casutto, issued on November 10, 1994, the two actions were consolidated. An evidentiary hearing on the consolidated action was commenced on January 3, 1995, at the Department's Region 1 Office, Stony Brook, New York, and continued on January 4th, 5th, 9th, 10th, 11th, 12th, 17th, 18th, 19th, 20th and January 25, 1995.

3. Staff appeared and was represented at the hearing by Assistant Regional Attorneys Louise Aja and Udo Drescher, Region I Office, Stony Brook, New York. Respondent Mt. Hope Asphalt Corp. appeared and was represented by Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, P.C., EAB Plaza, West Tower (14th Floor), Uniondale, New York 11556-0120, Sanford Strenger, Esq., of counsel, and Respondent Frank Petrosky appeared and was represented by Zimmer & Mazzei, 400 Townline Road, Hauppauge, New York 11788, Timothy, P. Mazzei, Esq., of counsel.

4. Upon review of the record and the Consolidated Hearing Report (the "Report") of ALJ Casutto (copy attached), I hereby adopt its Findings, Conclusions and Recommendations as my own.

5. I concur with the ALJ's recommendation concerning relief for the reasons stated in the Report. I find Respondent Mt. Hope unsuitable and unfit to engage in the activities for which it is currently permitted.

6. Concerning the Beneficial Use Determination which Respondent Mt. Hope received, 6 NYCRR §5202.2(d) required Respondents to comply with all conditions of Mt. Hope's Permit to Construct EP2. Therefore, compliance with the Permit to Construct was a condition upon which the Beneficial Use Determination was made. Respondents' receipt, storage and processing of petroleum-contaminated soil from sites in New Jersey was not authorized by the Permit to Construct EP2, and consequently, was not within the scope of authority of the Beneficial Use Determination made by Department Staff.

7. I concur in the ALJ's ruling which limited Staff's cause of action in complaint paragraph B7 to address only those reporting violations alleged to have occurred after May 8, 1992.

NOW THEREFORE, having considered this matter, it is ORDERED that:

I. Respondents Mt. Hope and Petrosky have violated Special Conditions (4)(B) and (5)(B) of Respondent Mt. Hope's Permit to Construct EP2; ECL §27-0707 and 6 NYCRR 360-1.7; and Navigation Law §1.73 and Navigation Law §175.

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II. Respondent Mt. Hope and Respondent Frank Petrosky, individually and in his capacity as an officer of Respondent Mt. Hope Asphalt Corp., with joint and several liability, shall pay a penalty in the amount of Sixty Three Thousand, Four Hundred ($63,400.00) Dollars, and an additional penalty of Ten Thousand ($10,000.00) Dollars is hereby assessed against Respondent Mt. Hope, due and payable within thirty (30) days of service of a conformed copy of this Order upon Respondents.

III. The charges against Respondents Mt. Hope and Petrosky, of violating Special Permit Condition (5)(e) (Permit to Construct EP2), ECL §17-0501, 6 NYCRR 613.8 are hereby dismissed.

IV. Respondents shall immediately cease importing any additional materials to the site and perform remedial investigation, remediation and closure of the Site in accordance with the recommendations of, and subject to the approval of, Department Staff.

V. Respondent Mt. Hope's Permit to Construct EP4 (#1-4722-01052/00004-0) is hereby revoked and its permit application for all; Certificate to Operate EP2 (#1-4722-01052/00003-0) is hereby denied. In effect, revocation and denial of Respondent Mt. Hope's permit and permit application render the Beneficial Use Determination void, because the BUD was conditioned upon Respondents' operation of the Calverton facility.

VI. All communications between Respondents and Department Staff concerning this order shall. be made to: Ray Cowen, Region I Regional. Director, New York State Department of Environmental Conservation, Loop Road, Building 40, Stony Brook, New York, 117902356.

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VII. The provisions, terms and conditions of the Order shall bind Respondents, their agents, servants, employees, successors and assigns and all persons, firms and corporations acting for or on behalf of Respondents.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
MICHAEL ZAGATA, COMMISSIONER

s/ Michael Zagata

Dated: Albany, New York
September 7, 1995

To: Sanford Strenger, Esq.
Farrell, Fritz, Caemmerer,
Cleary, Barnosky & Armentano
EAB Plaza
Uniondale, NY 11556-0120

Timothy P. Mazzei, Esq.
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Louise M. Aja, Esq.
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Region 1, NYSDEC
Building 40, SUNY Campus
Stony Brook, NY 11790-2356

Appendix C

Mt. Hope Asphalt Corp.
(a/k/a Mount Hope Asphalt Corp.)
395 Nugent Drive
Calverton, NY 11933

Frank Petrosky
President
Mt. Hope Asphalt Corp.
(a/k/a Mount Hope Asphalt Corp.)
395 Nugent Drive
Calverton, NY 11933

Frank Petrosky
c/o Mt. Hope Asphalt Corp.
395 Nugent Drive
Calverton, NY 11933

Frank Petrosky
21 Andiron Lane
Brookhaven, NY 11917

Appendix C

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION
50 Wolf Road
Albany, New York 12233-1550

Consolidated Hearing In the Matter

- of -

Alleged Violation of Articles 17, 19 and 27 of the New York State Environmental Conservation Law (ECL) , and Parts 203, 360 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and the Navigation Law of the State of New York, by

MT. HOPE ASPHALT CORP.,
a/k/a MOUNT HOPE ASPHALT CORP.,
AND
FRANK PETROSKY
INDIVIDUALLY AND IN HIS CAPACITY
AS AN OFFICER OF
MT. HOPE ASPHALT CORP., a/k/a
MOUNT HOPE ASPHALT CORP.
RESPONDENTS.

DEC NOS. 1-4722-01052/00003-01
1-4722-01052/00004-0
AND
BENEFICIAL USE DETERMINATION

Appendix C

HEARING REPORT

- by -

s/ Kevin J. Casutto
Kevin J. Casutto
Administraive Law Judge

SUMMARY

This hearing report addresses a consolidated action concerning alleged violations of water, air, and solid waste law and regulation, and Navigation Law and regulation by Respondents, and Staff's intent to revoke and deny Respondents' permits and permit applications based upon the alleged violations and Respondents, other relevant history.

Respondents opposed Staff's notice of intent to revoke their permit to construct an air pollution source, revoke a Beneficial Use Determination authorizing the use of petroleum-contaminated soil for the production of hot asphalt, and deny their permit application for a Certificate to Operate an air pollution source. Respondents presented a direct case attempting to show that the use of petroleum-contaminated soil in the production of hot asphalt was a new process, and a "learning experience" for both Respondents and Staff. Further, Respondents assert they did not commit any regulatory or statutory violation in operation of their facility but instead, continually sought to cooperate with Staff.

The report concludes that Respondents Mt. Hope and Petrosky, violated Special Conditions (4)(B) and (5)(B) of Respondent Mt. Hope's Permit to Construct an air pollution

source referred to as EP2; ECL §27-0707 and 6 NYCRR 360-1.7; and Navigation Law §§173 and 175. The report further concludes that the charges against Respondents Mt. Hope and Petrosky, of violating Special Permit Condition (5)(E) (Permit to Construct EP2), ECL §17-0501, 6 NYCRR 613.8 should be dismissed.

Although staff sought a penalty of $1.4 million, the report recommends a monetary penalty in the amount of $63,400.00 be assessed against Respondent Mt. Hope and Respondent Frank Petrosky, individually and in his capacity as an officer of Respondent Mt. Hope Asphalt Corp., jointly and severally, and that an additional penalty of $10,000.00 be assessed against Respondent Mt. Hope.

Further, the report recommends finding that Respondent Mt. Hope is unsuitable and unfit to hold Departmental permits. Respondent Mt. Hope's Permit to Construct EP4 (#1-4722-01052/000040) should be revoked and and its permit application for a Certificate to Operate EP2 (#1-4722-01052/00003-0) should be denied. Respondents should be ordered to cease importing any additional materials to the site, and ordered to perform remedial investigation, remediation and closure at the site pursuant to NL §173, ECL Article 27 and 6 NYCRR Part 360.

PROCEEDINGS

Pursuant to Articles 70 and 71 of the Environmental Conservation Law of the State of New York ("ECL") and Part 622 of Title 6 of the Official Compilation of Code, Rules and Regulations of the State of New York ("6 NYCRR") , a consolidated administrative enforcement/permit revocation/

permit denial hearing was held before Administrative Law Judge ("ALJ") Kevin J. Casutto, New York State Department of Environmental Conservation, Office of Hearings. The hearing was held on January 3, 1995, and was continued on eleven additional dates, concluding on January 25, 1995, in the New York State Department of Environmental Conservation ("DEC" or the "Department") Region 1 Regional Office, Loop Road, Building 40, Stony Brook, New York 11790-2356.

Following the hearing, the ALJ set a schedule for filing initial and reply memoranda. The complete hearing transcript was received by the Office of Hearings on February 15, 1995. The parties, initial memoranda were received on or before March 13, 1995, and the hearing record was closed on March 27, 1995 with receipt of the parties' reply memoranda.

Introduction

Respondent Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp. ("Mt. Hope") has operated a facility at Nugent Drive, Calverton, New York using virgin materials to produce hot asphalt, for approximately 22 years. In or about July, 1990, Thomas Accardi of Disposal Technologies, Inc. ("Accardi" and "Disposal Technologies," respectively) approached the New York State Department of Environmental Conservation ("the Department" and "Staff", respectively) Region I Staff with his concept of using No. 2 fuel oil-contaminated soil in the asphalt manufacturing process in place of virgin material, and staff approved the concept, under certain conditions. By late August, 1990, Mr. Accardi approached the Department's Division of Air with a proposed application to implement his concept. This application was on behalf of Respondent Mt. Hope and sought authority to modify Mt. Hope's certificate to operate its existing

asphalt plant at Calverton, Long Island (the "facility") to authorize the processing of contaminated soil through the asphalt plant's dryer for incorporation into asphalt products.

In or about Spring, 1991, Respondent Mt. Hope, with the assistance of Disposal Technologies, Inc. and Thomas Accardi, sought authority to upgrade its facility for use of petroleum-contaminated soil in hot asphalt production. The Mt. Hope application was the first in the State of New York proposing to process petroleum-contaminated soil in the production of asphalt. On or about August 9, 1991, Respondent Mt. Hope, obtained a beneficial use determination ("BUD") and a Permit to Construct an afterburner referred to as Emissions Point 2 (application #1-472201052/00003-0; Permit to Construct Emission Point No. 00002, an afterburner ["EP2"]; "permit to construct afterburner" or "permit to construct EP2"). Mt. Hope constructed the afterburner, and in or about October, 1992, Mt. Hope filed an application for issuance of a Certificate to Operate a Source of Air Contamination, for EP2.

On January 14, 1993 Respondent Mt. Hope entered into a Consent order with the Department to resolve certain violations and to assure continued authority to operate EP2 (Consent Order #1-507492-06). The Consent Order required, among other things, construction of a rehydration chamber, Emissions Point 4. Thus, on or about February 16, 1993, Mt. Hope submitted an application for a Permit to Construct/ Certificate to operate a Rehydration Chamber, EP4. On July 22, 1993, the Department issued the Permit to Construct and Test a Rehydration Chamber (Permit to Construct #1-4722-01052/00004-0 (Emission Point No.00004, rehydration chamber ("EP4")]; permit issued July 19, 1993, indicating an expiration date of July 18, 1994).

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Earlier, on May 28, 1991 Respondent Mt. Hope entered into a Consent Order with the Department to resolve violation of ECL Article 19 and 6 NYCRR Part 201 related to the facility (Consent Order RI-4570-91-05). On July 18, 1991, Respondent Mt. Hope entered into a Consent Order with the Department to resolve violations of ECL Articles 15 and 25, and 6 NYCRR Part 661, related to another Mt. Hope facility located in Flushing, Queens, New York. (Consent Order #R2-3559-91-03).

On September 15, 1993 Staff issued a combined Notice of Intent to Revoke Mt. Hope's Permit to Construct the EP4 rehydration chamber, revocation of Mt. Hope's BUD and denial of Mt. Hope's application for a Certificate to Operate EP2 (a modified facility including the afterburner and rehydration chamber, which was intended to process petroleum-contaminated soil in the production of asphalt ("the combined notice" and hereinafter referred to as the "Permit" aspect of the consolidated action)).

By letter dated September 28, 1993, pursuant to 6 NYCRR Parts 621 and 624, Respondents sought a hearing to review Staff's combined Notice of Intent to Revoke the EP4 permit to construct (621.14(d)), Denial of Mt. Hope's application for a permit to operate EP2 (6 NYCRR 621.7(f)) and BUD Revocation.

Since autumn, 1993, Respondents have ceased all production of asphalt at the facility.

* * *

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Separately, by Notice of Hearing and Verified Complaint dated September 17, 1993, duly served upon Respondents, Staff initiated an enforcement action against Mt. Hope and three corporate officers, Jay Boyle, Paul Abrams and Frank Petrosky (hereinafter referred to as the "enforcement" aspect of the action). The corporate officers were charged in their corporate and individual capacities. During pre-hearing motion practice and discovery, Staff withdrew its Complaint against two of the three corporate officers, Jay Boyle and Paul Adams. Respondent Frank Petrosky, the third individual respondent, is President of corporate Respondent Mt. Hope.

On November 10, 1994, upon joint motion of Staff and Respondents, the two actions were consolidated into a single action, to proceed under 6 NYCRR 622. The joint motion for consolidation was granted because the allegations in Staff's enforcement action are also asserted as a basis for revocation/ denial in Staff's permit action.

Six substantive pre-hearing rulings were issued. On June 22, 1994, a "Ruling on Prehearing Motions" [First Ruling] on July 12, 1994 a "Ruling on Motion for Reconsideration" [Second Ruling]; on September 29, 1994 a "Ruling on Motion for Disqualification and Motion to Dismiss Affirmative Defenses" [Third Ruling]; on November 1, 1994 a "Ruling on Motion to Amend Complaint" [Fourth Ruling]; on December 7, 1994 a "Ruling on Motion to Quash" [Fifth Ruling]; and on December 27, 1994 a "Ruling on Asserted Privileges [Sixth Ruling].

Staff sought leave to appeal to the Commissioner, from the second Ruling insofar as it precluded Staff from pursuing a portion of its cause of action for the time period prior to May

9, 1992. By determination of the Assistant Commissioner for Hearings, dated August 5, 1994, Staff's application for interlocutory appeal was denied. However, Staff was advised that the issue could be preserved for review at the conclusion of the proceeding in Staff's closing brief, and Staff has done so.

Staff' initial Complaint was amended twice prior to hearing. Pursuant to the First Ruling, on July 8, 1994 Staff filed its first Amended Complaint revising its theory of liability on one cause of action. In response, Respondents filed an amended answer dated September 1, 1994. Subsequently, by Order dated November 3, 1994, the ALJ granted Staff's motion seeking to file its Second Amended Complaint, adding a new cause of action. The new cause of action alleges Respondents buried petroleum-contaminated soil in the parking lot of their asphalt processing plant located at 395 Nugent Drive, Calverton, New York, in violation of Navigation Law ("NL") Article 12, ECL Article 19 and 6 NYCRR Parts 360 and 613. Staff does not seek additional monetary penalties for this new cause of action, but seeks an order of remediation. The new allegations are also discussed below in the context of the record of compliance/ permit aspect of this consolidated action.

Following issuance of the initial Complaint, in autumn, 1993, the Office of the Suffolk County District Attorney obtained an indictment against Respondents Mt. Hope and Petrosky, based at least in part upon activities that are at issue in this consolidated administrative action. That matter was pending, pretrial, at the time this administrative consolidated hearing was held.

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An evidentiary hearing on the consolidated action was commenced on January 3, 1995, and continued on January 4th, 5th, 9th, 10th, 11th, 12th, 17th, 18th, 19th, 20th and January 25, 1995. Staff appeared and was represented at the hearing by Assistant Regional Attorney Louise M. Aja and Assistant Regional Attorney Udo Drescher, NYSDEC Region 1 Office, Loop Road, Building 40, Stony Brook, New York 11790-2356. To support its case, Staff presented fourteen witnesses: Kathryn Murphy, Environmental Program Specialist I., Robert Becherer, Regional Hazardous Substances Engineer, Sid Caramintzos, Environmental Engineer 1, Karen Baker (née Munze) , Bureau of Water Resources, Robert A. Greene, Regional Permit Administrator, Karen Gomez, Environmental Engineer 2 and Ray E. Cowen III, Regional Director. From the Office of the Suffolk County District Attorney, Steven Drielak, Detective Lieutenant, Commanding Officer, Environmental Crime Unit; from the Suffolk County Department of Health, George Mathew, Chemist, Francis J. Amendola, Forensic Scientist, Madelaine Feindt, Public Health Sanitarian and Scott Mirabella, Chemist. Also called to testify by Staff were Kathleen Morrison a former employee of Respondent Mt. Hope, and Richard Parish, President, Impact Environmental, Inc.

Initially, Respondents Mt. Hope and Petrosky appeared and were represented by McMillan, Rather, Bennett & Rigano, P.C., Barry S. Cohen, of counsel. On or about February 24, 1994, the law firm of Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, P.C., EAB Plaza, West Tower (14th Floor), Uniondale, New York 11556-0120, Sanford Strenger, Esq., of counsel, assumed representation of Respondents. On or about November 10, 1994, the law firm of Zimmer & Mazzei, 400 Townline Road, Hauppauge, New York 11788, Timothy P. Mazzei, Esq., assumed representation of Respondent Frank Petrosky.

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Respondent Mt. Hope presented testimony from Jay Boyle, an employee of Respondent Mt. Hope and Olin C. Braids, Ph.D. Respondent Petrosky presented no witnesses.

Staff's Position

I. *The Notice of Hearing and Complaint*

Pursuant to a ruling by the Administrative Law Judge ("ALJ"), Staff filed the (First) Amended Complaint on July 8, 1994[1]. The First Amended Complaint was different from the initial Complaint insofar as it included, in Complaint §C(6)(b), the allegation that because Respondent had violated a Beneficial Use Determination, the subsequent receipt and/or processing and/or disposal of any material without a permit under 6 NYCRR Part 360 was a violation of Part 360.

On September 30, 1994 the Department filed a motion to amend the First Amended Complaint by adding a new section "D". This new section alleges that Respondents violated ECL Article 17 and 6 NYCRR Part 613 because they caused a discharge of petroleum through the burial and stockpiling of petroleum-contaminated soil at the facility on or before September 16, 1993, and further that Respondents failed to notify the Department of that discharge. In addition, Staff alleges that Respondents violated 6 NYCRR Parts 360-1.7(a)(1)(i) and 360-1.5(a), because the burial and stockpiling of petroleum-contaminated soil constitutes disposal of solid waste. Staff asserts that such activities require a solid waste management facility ("SWMF") permit issued pursuant to ECL

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1. "Ruling on Prehearing Motions" (First Ruling) from June 22, 1994, at p.7 ¶2.

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Article 27 and 6 NYCRR Part 360, which Respondents did not possess. While the actual penalty amount requested remained the same as in the First Amended Complaint, new section "D" of Staff's Second Amended Complaint seeks remedial investigation and remediation, *i.e.*, clean-up of all petroleum-contaminated soil at the facility.

Staff's motion to add the additional cause of action was granted, and the Second Amended Complaint (hereinafter, the "Complaint") was deemed served on November 3, 1994[2].

Staff alleges violations by Respondents in its Second Amended Complaint, which are summarized as follows:

Complaint Section B;
Violation of ECL Article 19, and 6 NYCRR Part 201

Violation of ECL Article 19, 6 NYCRR §201.2(d) and Permit to Construct (EP2), Special Permit Condition #4.B., by Respondents' receipt and/or processing on 39 occasions[3], of contaminated soil from sites located in the State of New Jersey which did not have a NYSDEC-assigned spill number.

Violation of ECL Article 19, 6 NYCRR §201.2(d) and Permit to Construct (EP2), Special Permit Conditions #5.B. and 5.E., by failure to maintain, and failure to submit to the Department on a

---

2. Fourth Ruling, November 1, 1994.

3. Identified in "Appendix A", attached to this Hearing Report.

quarterly basis, logs which contained entries for each of the 39 instances described in the first alleged violation. (In its closing brief, Staff changed its position by asserting it has proven 36 of the 39 instances alleged in the Complaint).

Complaint Section C:
Violation of ECL Article 27 and 6 NYCRR Part 360

Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, by operating a solid waste management facility ("SWMF") by receipt and/or processing and/or disposal of contaminated soil on the above referenced 39 occasions, in a manner not consistent with a Beneficial Use Determination ("BUD") issued to Respondent Mt. Hope (issued August 9, 1991); or alternatively, Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, because the BUD did not contemplate receipt and/or processing and/or disposal of any material from August 7, 1991 to September 15, 1993. (As noted above, in its closing brief, Staff changed its position by asserting it has proven 36 of the 39 instances alleged in the Complaint).

Complaint Section D:
Violation of Navigation Law Article 12, ECL Article 17 and 6 NYCRR Parts 360 and 613

Respondents violated Navigation Law §173 and ECL §17-0501(1) by causing a discharge of

petroleum at the Mt. Hope facility on or before September 16, 1993, which violation constitutes a continuing violation from at least September 16, 1993 to the present.

Respondents violated NL §175 and 6 NYCRR 613.8 by failing to report the facility's spill to the Department (now identified by Department spill number 94-07172).

Respondents violated 6 NYCRR 360-1.7(a)(1)(i)[4], by continuing storage and disposal of petroleum-contaminated soil at the Mt. Hope facility, from at least September 16, 1993 to the present.

Staff maintains that since Respondent Petrosky is the President of Respondent Mt. Hope and has been responsible for daily management of Mt. Hope, Respondent Petrosky is liable for the alleged violations both individually and in his corporate capacity.

Staff seeks a monetary penalty of $1,081,500.00 from Respondents, jointly and severally, for these alleged violations, or in the alternative, pursuant to the ALJ's Second Ruling, a monetary penalty of $877,500.00 from Respondents, jointly and severally (Staff revised its request for monetary penalty slightly downward in its closing brief) . Staff also seeks an order that Respondents 1) cease conducting any activities within the Department's regulatory authority; 2) submit a remediation plan and implementation schedule for Staff's approval; and upon

4. Staff alleges violation of this provision by Respondents prior to and after the regulatory provision was amended, effective October 9, 1993.

approval, remediate and clean up all petroleum-contaminated soil at the facility, whether buried or above ground; and 3) such other and further relief as the Commissioner may deem just and proper.

II. *The Combined Notice of Intent to Revoke, Revocation and Denial*

Further, pursuant to Staff's combined notice and the allegations set forth in the Complaint that Staff asserts it has proven at hearing, Staff seeks revocation of all Departmental authority granted to Respondents to operate the facility, and denial of all Respondents' pending applications for continuing or additional authority to operate, because Respondents are allegedly unsuitable and unfit to engage in environmental activities regulated by the Department due to their history of non-compliance.

By letter dated September 15, 1993 Staff issued to Respondent Mt. Hope, a Notice of Permit Denial (regarding Mount Hope's application #1-4722-01052/00003-0, for Certificate to Operate EP2) , Notice of Intent to Revoke (Permit to Construct #1-4722-01052/00004-0, Emission Point 4, rehydration chamber) and Revocation of Beneficial Use Determination (regarding a Beneficial use Determination issued to Mt. Hope on August 9, 1991). In effect, Staff seeks revocation of all authority Respondents have been granted to operate the facility, and denial of all pending applications for additional or continued authority to operate. The combined notice letter identifies five factors upon which Staff bases its notice:

> (1) violation of Permit to Construct (EP2) permit condition requiring only use of petroleum-

contaminated soil from sites identified by a Departmental spill number on 39 occasions;

(2) violation of Permit to Construct permit condition (EP2 afterburner) requiring maintenance and quarterly submittal of records to Staff, which submittals failed to identify 39 instances of receipt of contaminated soil at the facility;

(3) that commission of the two above referenced violations rendered the Beneficial Use Determination invalid on those dates, and therefore constituted operation without a solid waste management facility permit on those dates, in violations of ECL Article 27 and 6 NYCRR 360 ("Part 360");

(4) failure to comply with audit requirements imposed by the January 14, 1993 Consent Order; and

(5) Respondents' history of non-compliance, including a July 18, 1991 Consent Order; the January 14, 1993 Consent Order; and six criminal simplified information issued to L.L.H. Recycled Aggregates (a company which shares ownership and operations with Respondent Mt. Hope).

Respondents' Position

Respondents filed an Answer to the initial Complaint and each Amended Complaint. In response to Staff's Second Amended Complaint, Respondents each filed an Answer dated

October 6, 1993. Those Answers each assert two affirmative defenses.

First, Respondents each assert as an affirmative defense, that in the 39 instances when Mt. Hope received petroleum-contaminated soil from New Jersey sites, the soil had not been used for stack testing, but had been part of general operations that had been conducted at the facility as permitted by the Department. Therefore, Respondents assert that Staff failed to prove that Mt. Hope violated the ECL or regulations of the Department in the manner alleged in the Department's Second Amended Complaint dated September 30, 1994.

Second, Respondents each assert as an affirmative defense, that the allegations contained in Section "C" of the Second Amended Complaint (alleging violations of ECL Article 27 and 6 NYCRR Part 360) were conducted within the authority of the BUD or, in the alternative, were consistent with the requirements of ECL Article 27 and 6 NYCRR 360. These affirmative defenses are discussed below in the context of the corresponding Complaint allegations.

Respondents assert the record demonstrates that Respondent Mt. Hope committed no violation of Departmental regulatory programs, but to the contrary, performed a valuable service to the public in the manufacture of asphalt and the education of the Department as to how petroleum-contaminated soil waste can be recycled into an environmentally sound and beneficial product, hot asphalt.

Further, regarding alleged discharge of petroleum product, Respondents assert that samples collected and analyzed by Suffolk County Department of Health Services ("SCDOHS")

are unreliable due to improper sampling technique, improper sample analysis method and failure to maintain chain of custody of the samples.

Respondent Petrosky asserts that Staff failed to establish that he was individually liable for any violation alleged in Staff's Complaint. Petrosky further asserts that Staff failed to prove that he was involved in the day-to-day activities of the facility, or was involved in the day-to-day operation of the facility.

Regarding the permit aspect of the consolidated action, Respondents assert that Staff failed to show that Respondents are unfit and unsuitable to engage in regulated environmental activities. Therefore, Respondents assert that Mt. Hope should receive a Certificate to Operate EP2, at which Mt. Hope may produce asphalt and asphalt products utilizing petroleum-contaminated soil as an aggregate and a Permit to Construct and test EP4, the rehydration chamber. Further, Respondents assert that the Beneficial Use Determination ("BUD") authorizing Mt. Hope to receive, temporarily store and use petroleum-contaminated soil as an aggregate in asphalt production, should be continued.

Respondents conclude that the alleged violations against Respondent Mt. Hope and Respondent Petrosky should be dismissed, and Certificates to Operate Mt. Hope's afterburner, EP2, and its rehydration chamber, EP4, with petroleum-contaminated soil should be granted.

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Findings of Fact

I. *Background*

1. Respondent Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp. ("Mt. Hope") is a corporation with offices for the transaction of business at Nugent Drive, Calverton, New York. Respondent Mt. Hope has operated a facility at that location for approximately 22 years, using virgin materials to produce hot asphalt.

2. Respondent Frank Petrosky is President of corporate Respondent Mt. Hope.

3. In or about July, 1990, Thomas Accardi of Disposal Technologies, approached the Department's Region I Staff with his concept of using No. 2 fuel oil-contaminated soil in the asphalt manufacturing process in place of virgin material.

4. Thomas Accardi was a principal of Disposal Technologies, Inc.

5. By late August, 1990, Accardi approached Staff of the Department's Division of Air with an application on behalf of Respondent Mt. Hope to implement his concept of using No. 2 fuel oil-contaminated soil in the asphalt manufacturing process in place of virgin material. Accardi sought authority to modify Mt. Hope's Certificate to Operate its existing asphalt plant at Calverton, Long Island (the "facility") to authorize the processing of contaminated soil through the asphalt plant's dryer for incorporation into asphalt products.

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6. The Mt. Hope application was the first in the State of New York proposing to process petroleum-contaminated soil in the production of asphalt.

7. Staff approved the concept, with certain conditions. On or about August 9, 1991, Respondent Mt. Hope, obtained a beneficial use determination ("BUD") and a Permit to Construct an afterburner referred to as Emissions Point 2 ("Permit to Construct afterburner" or "Permit to Construct EP2"). The BUD and Permit to Construct EP2 specified conditions under which the Accardi/Mt. Hope proposal was authorized.

8. The expiration date of the Permit to Construct EP2 was August 6, 1992. At Respondents' request, the permit was later amended by extending the expiration date to September 21, 1992. The purpose of this extension was to provide additional time for Respondents to conduct the EP2 stack test.

9. The cover letter to the Permit to Construct, dated August 9, 1991, was a Beneficial Use Determination (issued pursuant to 6 NYCRR 360-1.2[a][4][vii][a]).

10. Prior to issuance of the Permit to Construct EP2, a two-day stack test was conducted at the facility on November 7, 1990 and November 9, 1990.

11. Respondent Mt. Hope constructed the EP2 afterburner and conducted a stack test of the afterburner on August 26, 1992.

12. In or about October, 1992, Mt. Hope filed an application for issuance of a Certificate to Operate EP2, a Source of Air Contamination.

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II. *The Enforcement Action*

13. Staff initiated an enforcement action against Respondents Mt. Hope and three corporate officers, Jay Boyle, Paul Abrams and Frank Petrosky, by Notice of Hearing and Verified Complaint dated September 17, 1993, duly served upon Respondents (hereinafter referred to as "the enforcement" action).

14. The three corporate officers were charged both in their corporate and individual capacities. Staff withdrew its Complaint against Jay Boyle and Paul Adams, during pre-hearing motion practice and discovery.

15. Following issuance of the initial Complaint, in autumn, 1993 the Office of the Suffolk County District Attorney obtained an indictment against remaining Respondents Mt. Hope and Petrosky, based at least in part upon the same activities that are at issue in this consolidated administrative action. That matter was pending, pre-trial, at the time this consolidated hearing was held.

16. Since autumn, 1993, Respondents have ceased all production of asphalt at the facility.

A. *Violation of ECL Articles 19 and 27, and 6 NYCRR Part 201 and 360*

17. Respondent Mt. Hope maintained logbooks at the facility, contemporaneous records that identify the type of material received by the facility, the date received, origin of the material (the site the material came from), the NYSDEC Spill Number, the quantity of material received on the dates

indicated, cumulative total material received, invoice number and date billed.

18. On at least 36 occasions from on or about November 13, 1991 to on or about September 17, 1992, Respondent Mt. Hope received and/or processed contaminated soil from sites located in the State of New Jersey. (See Hearing Report Appendix A).

19. For the 36 occasions from on or about November 13, 1991 to on or about September 17, 1992 that, Respondent Mt. Hope received and/or processed contaminated soil from sites located in the State of New Jersey, Mt. Hope's logbooks contain seven digit numbers similar to Departmental spill numbers, under the column heading, "NYSDEC Spill No.". Further, Respondent Mt. Hope's files also contain seven digit numbers similar to Departmental spill numbers.

20. The New York State Department of Environmental Conservation does not issue spill numbers for spills occurring outside the State of New York. None of the 36 New Jersey sites had a NYSDEC-assigned spill number.

21. The New Jersey Department of Environmental Protection has never issued seven digit spill numbers. Instead, since 1991, spill numbers issued by that Department contain only ten, eleven or twelve digits.

22. The New Jersey Department of Environmental Protection does not assign a New Jersey case number to all sites where petroleum-contaminated soil is generated. Approval of the New Jersey Department of Environmental Protection is required prior to any transportation of petroleum-contaminated

soil to locations outside the State of New Jersey. Further, the office within the New Jersey Department of Environmental Protection that oversees the disposal of petroleum-contaminated soil outside of the State of New Jersey, does not require the assignment of a New Jersey DEP case number.

23. No Staff member authorized or otherwise allowed Respondent Mt. Hope to receive, store or process petroleum-contaminated soil from New Jersey.

24. No permit variance had been granted to Respondent Mt. Hope and no permit modification had been issued to Respondent Mt. Hope to authorize receipt, storage or processing of petroleum-contaminated soil from New Jersey.

25. The analytical reports comprising pre-marked Exhibits 169-198 (excluding Exhibits 172 and 198), were maintained as business records in the offices of Respondent Mt. Hope and had been removed from those offices pursuant to search warrant by the Suffolk County District Attorney.

26. The analytical reports comprising Exhibits 163 through 198 (except for Exhibits 169, 171, 180 and 182), contained laboratory analyses which indicated that the respective material was non-hazardous pursuant to the Quality Assurance/Quality Control (QA/QC) provisions of Mt. Hopes Permit to Construct EP2. Further, all the those analyses were conducted by a New York certified laboratory.

27. Regarding Exhibits 169, 171, 180 and 182, the original reports maintained at Respondent Mt. Hope's offices had contained laboratory analyses, but copies which Staff received from the District Attorney's Office by Staff lacked those analyses.

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28. Exhibits 212 A, B and C, are three quarterly reports submitted by Respondent Mt. Hope to Department Staff. These quarterly reports do not contain any entries indicating that Respondent Mt. Hope received and processed petroleum-contaminated soil from New Jersey on 36 occasions between November 1991 and September 1992.

29. However, Respondent Mt. Hope's log books do contain entries indicating that Mt. Hope received and processed petroleum-contaminated soil from New Jersey on 36 occasions between November 1991 and September 1992.

B. *Violation of Navigation Law Article 12, ECL Article 17 and 6 NYCRR Parts 360 and 613*

The Suffolk County Department of Health Services Soil Samples

30. Pursuant to a search warrant obtained by the office of the Suffolk County District Attorney, members of the Suffolk County Department of Health Services obtained soil samples at the facility on September 16, 1993.

31. It was raining intermittently on September 16, 1993 during the soil sample collection process.

32. A back-hoe used for excavation of sampling points was decontaminated at each sample point.

33. Many photographs were taken to document the location of each sample point.

34. Although an asphalt surface was penetrated to obtain samples in the "parking lot" area of the facility, no asphalt particles were collected in the sample bottles.

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35. The SCDOHS Sanitarian actually collecting soil samples wore two pair of gloves, and replaced the outer gloves after completing sampling collection at each sample point.

36. After a SCDOHS Sanitarian obtained a sample, it was placed in a sample bottle. A new bottle was used to collect each soil sample.

37. The sample bottle was then sealed and the exterior was cleaned, if necessary. The Sanitarian then handed the sample directly to SCDOHS laboratory personnel, who preserved each sample in its own plastic bag, in a cooler.

38. One of the two SCDOHS laboratory personnel present on site were in physical custody of the samples, during the entire day of sample collection. After sample collection was completed at the site, SCDOHS laboratory personnel brought the sample cooler to the SCDOHS van.

39. Inside the van, the laboratory staff performed a final count of samples taken. Then, the laboratory personnel transported the sample cooler, with samples, to the county laboratory.

40. Laboratory receipt of the samples was documented by entries in a logbook. Each sample was assigned a laboratory number, sealed in plastic and kept in a locked refrigerator, located in a locked "evidence room" at the laboratory.

41. SCDOHS personnel completed "Chain of Custody" forms detailing exactly who had custody of the samples throughout each day.

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42. Analytical results of five of the soil samples obtained by SCDOHS at the facility on September 16, 1993 show high levels of petroleum constituents in certain locations. The five SCDOHS samples are identified as 6MF, 7MFI, 18MF, 20MF and 21MF.

43. SCDOHS Chemist Amendola used the federal Environmental Protection Agency "8240" methodology to analyze the soil samples for presence of petroleum constituents.

44. Amendola employed three variations from the EPA 8240 methodology when analyzing the samples. He used a capillary column, rather than a packed column; he calculated the analysis using external calibration instead of internal calibration; and lastly, he did not heat the samples to 40 degrees centigrade.

45. The variation of use of a capillary column rather than a packed column under the EPA 8240 methodology was specifically approved by the New York State Department of Health as an acceptable variation from the EPA recommended methodology.

46. Regarding his use of external calibration, Amendola recalculated the analysis of four of the five samples using internal calibration, at a later date. The results using internal calibration indicate a higher level of contamination of petroleum constituents in all four samples, than did the external calibration analysis method.

47. Heating the samples to 40 degrees centigrade would have produced greater violation of the sample, and would have yielded slightly higher analysis results than was obtained absent heating of the soil samples.

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48. Some sample analysis results are stamped "Some surrogate standard values are below acceptable levels".

49. Staff submitted no evidence to show that any testing of groundwater indicated a contravention of Departmental water quality standards.

50. Neither Respondent Mt. Hope nor Respondent Petrosky ever reported a petroleum discharge to the Department.

51. Once Staff learned of the petroleum discharge at the facility, Gomez prepared a spill report for the facility and obtained a spill number from the Department's spill hotline.

Respondent Petrosky

52. Respondent Petrosky regularly held himself out to Staff as the individual to be contacted in matters involving Mt. Hope Asphalt Corp. Also, Petrosky maintained an office at Mt. Hope's offices located at the facility, he was regularly on-site, he regularly met with Department personnel during Staff's site visits to the Mt. Hope facility, and he regularly responded to Staff's concerns. For example, it was Petrosky that responded to Staff's concerns about dust at the facility by having the road between the offices and the facility paved.

53. Respondent Petrosky certified Mt. Hope documents, stating that the petroleum-contaminated soil indicated therein was recycled and made into road paving materials.

54. Respondent Petrosky, in his capacity as President of Respondent Mt. Hope, signed the two Consent Orders concerning the facility.

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55. Respondent Petrosky also regularly attended virtually all meetings with Department Staff at the Department's Region 1 Offices and at the Mt. Hope Asphalt Corp. facility, on behalf of Mt. Hope.

III. *The Permit Action*

56. By letter dated September 15, 1993 Staff issued to Respondent Mt. Hope, a Notice of Permit Denial (regarding Mount Hope's application #1-4722-01052/00003-0, [Certificate to Operate Emission Point No.00002, an afterburner)), Notice of Intent to Revoke Permit (Permit to Construct #1-4722-01052/ 00004-0 [Emission Point No. 00004, rehydration chamber]), and Revocation of Beneficial Use Determination (regarding the Beneficial Use Determination issued to Mt. Hope on August 9, 1991; (hereinafter, "the combined notice", hereinafter referred to as "the permit" action]).

57. The combined notice letter identifies five factors upon which Staff bases its notice:

> (1) violation of Permit to Construct (EP2) permit condition requiring only use of petroleum-contaminated soil from sites identified by a Departmental spill number on 39 occasions;
>
> (2) violation of Permit to Construct permit condition (EP2 afterburner) requiring maintenance and quarterly submittal of records to Staff, which submittals failed to identify 39 instances of receipt of contaminated soil at the facility;
>
> (3) that commission of the two above referenced violations rendered the Beneficial Use

Determination invalid on those dates, and therefore constituted operation without a solid waste management facility permit on those dates, in violations of ECL Article 27 and 6 NYCRR 360 ("Part 360");

(4) failure to comply with audit requirements imposed by the January 14, 1993 Consent Order; and

(5) Respondents' history of non-compliance, including a July 18, 1991 Consent Order; the January 14, 1993 Consent Order; and six criminal simplified information issued to L.L.H. Recycled Aggregates (a company which shares ownership and operations with Respondent Mt. Hope) .

The Falsified Analytical Report and Signature

58. Richard Parish has been employed as President of Impact Environmental for approximately five years.

59. In mid-1991, Impact Environmental was retained as a consultant to Disposal Technologies.

60. Impact Environmental, in its consultant capacity to Disposal Technologies, performed sampling on behalf of Mt. Hope, and sent the samples to appropriate laboratories for analysis. Upon receiving the analysis from the laboratory, the analysis would be forwarded to Disposal Technologies under Parish's cover letter.

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61. Regarding the Ideal Aluminum site, 100 West 7th Street, Bayonne, New Jersey, 116.71 tons of material was received by Respondent Mt. Hope on December 24, 1991.

62. An analytical report for this material exists in the form of a letter dated December 31, 1991, addressed from Parish on behalf of Impact Environmental to Disposal Technologies at the Mt. Hope facility address.

63. Exhibit 170, regarding the Ideal Aluminum site, is comprised of copies of documentation maintained by Respondent Mt. Hope at its facility. The original documents were obtained pursuant to search warrant by the office of the Suffolk County District Attorney,

64. Information reported in the Ideal Aluminum analytical report/letter states, "[b]ased on our investigation of 12-24-91 the contaminated material is non-hazardous pursuant to the standards promulgated by the New York State Department of Environmental Conservation. All information reported by the client was confirmed by either Freedom of Information Legislation and/or inspection."

65. The Ideal Aluminum analytical report contains what purports to be Parish's signature. In fact, it is not his signature. Further, the letter was not prepared by Parish or by Parish's office, Impact Environmental.

66. The Ideal Aluminum analytical report and signature are not genuine, but were falsified. It is impossible to know whether the material described therein, received by Respondent Mt. Hope, was truly non-hazardous petroleum-contaminated soil.

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Respondent Mt. Hope's History of Consent Orders

67. On May 28, 1991 Respondent Mt. Hope entered into a Consent order with the Department to resolve violations of ECL Article 19 and 6 NYCRR Part 201, for commencing construction to install the afterburner at the facility as an air pollution control device, without the required Permit to Construct. Under the Consent Order, signed by Respondent Frank Petrosky in his capacity as President of Mt. Hope, a $500.00 penalty was imposed upon Respondent Mt. Hope. (Consent Order R1-4570-91-05).

68. On July 18, 1991 Respondent Mt. Hope entered into a Consent Order with the Department regarding Mt. Hope's asphalt manufacturing plant located in Flushing, Queens, New York. That Consent Order resolved violations of ECL Articles 15 and 25, and 6 NYCRR Part 661, by Respondent Mt. Hope for allowing stone sand screenings to enter regulated navigable waters and tidal wetlands without the required permits. Under the Consent Order, signed by Mt. Hope's Treasurer, Paul Abrams, a $10,000.00 penalty and an order requiring remediation was imposed upon Respondent Mt. Hope. (Consent Order #R2-3559-91-03).

69. On January 14, 1993 Respondent Mt. Hope entered into a Consent Order with the Department to resolve certain violations at the facility and to assure continued authority to operate EP2 (Consent Order 11-5074-92-06). The January, 1993 Consent order required construction of a rehydration chamber, EP4. This Consent Order also required dissolution of the Mt. Hope - Accardi/Disposal Technologies relationship.

70. The January, 1993 Consent Order also required Mt. Hope to dissolve the Mt. Hope - Accardi /Disposal Technologies

relationship (Consent Order. Schedule, A, Section IV) , and to comply with detailed financial auditing requirements (Consent Order Schedule A, Section V), including an affidavit from a Certified Public Accountant certifying that it performed an investigation of Respondent Mt. Hope's records regarding Thomas Accardi's relationship to Mt. Hope. Consent Order 1-5074-92-06.

71. On or about February 16, 1993, Mt. Hope submitted an application for a Permit to Construct/Certificate to Operate a Rehydration Chamber, EP4. On July 22, 1993, the Department issued the Permit to Construct and Test a Rehydration Chamber, EP4 (permit issued July 19, 1993, indicating an expiration date of July 18, 1994).

72. On November 29, 1990, the Department's then-Director of the Division of Solid Waste issued a memorandum for intra-agency purposes, to the Department Staff's Regional Solid Waste Engineers, regarding beneficial use of petroleum-contaminated waste soil as an aggregate in asphalt production.

Conclusions of Law

1. Respondents are both "persons" within the meaning of ECL §19-0107.

2. Thomas Accardi. and Disposal Technologies, Inc., were agents for Respondent Mt. Hope.

3. Respondents did not operate the EP2 afterburner, an air contamination source, in accordance with Respondent Mt. Hope's August 7, 1991 Permit to Construct because Respondents regularly violated Special Condition (4)(B) of the permit.

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4. Respondents' affirmative defense that Special Condition (4)(B) only applied to stack tests is without merit. The limitations and requirements set forth in the Permit to Construct EP2, Special Condition (4)(B), applied to Respondents' operation of the facility throughout the period during which the permit was valid.

5. "Processing" of petroleum-contaminated soil, as that term is used in Permit to Construct EP2, Special Condition (4)(B), includes "receipt" of petroleum-contaminated soil for purposes of processing.

6. Each "Job" (or site) identified in the Complaint is taken to represent an allegation of one incident of receipt of petroleum-contaminated soil, even though the record establishes that for at least some of the proven violations, Respondent Mt. Hope did, in fact, receive a number of shipments of contaminated soil over a period of days or weeks for particular jobs.

7. For the 36 New Jersey job sites identified in Exhibits 163 through 198, petroleum-contaminated soil from sites located in the State of New Jersey was received and processed by Respondent Mt. Hope.

8. For the 36 New Jersey sites identified in Exhibits 163 through 198, the spill numbers used by Respondents in their logbooks and files are fabricated spill numbers. Those spill numbers were not issued by the New Jersey Department of Environmental Protection or by the Department.

9. Respondents fabricated these spill numbers to create the appearance that Respondents were operating within the

authority of Respondent Mt. Hope's Permit to Construct EP2 and BUD.

10. Respondent Mt. Hope intentionally omitted entries from three quarterly reports (August 15, 1991 to March 31, 1992; April 1, 1992 to June 30, 1992; and July 1, 1992 to September 30, 1992, respectively) regarding petroleum-contaminated soil it received and processed from the 36 New Jersey sites. Respondent Mt. Hope did so because it knew that such activities exceeded the scope of authority of its Permit to Construct EP2 and BUD. Respondents thereby violated Special Permit Condition (5)(B), and consequently 6 NYCRR §201.2(d), on three occasions.

11. *Carlson Associates* is not applicable regarding computation of monetary penalty in the present action. However, the provisions of ECL Article 71 are relevant and do provide for a continuing violation of ECL Article 27. ECL §71-2703(l). Staff has properly asserted a continuing violation of ECL §27-0707 and 6 NYCRR 360-1.7, for operating a solid waste management facility without a permit from November 17, 1991 (the first date of receipt of soil from a New Jersey site) to September 17, 1992 (the last date of receipt of soil from a New Jersey site).

Applicability of the Beneficial Use Determination

12. Respondents' receipt storage and processing of petroleum-contaminated soil from sites in New Jersey was not authorized by the Permit to Construct EP2.

13. Compliance with the Permit to Construct EP2 was a condition upon which the Beneficial Use Determination was

premised. Therefore, Respondents' receipt. Storage and processing of petroleum-contaminated soil from sites in New Jersey was not within the scope of authority of the Beneficial Use Determination.

14. A permit issued pursuant to 6 NYCRR Part 360 is required for these activities.

15. Because Respondent Mt. Hope acted outside the scope of authority of the BUD, Mt. Hope operated a solid waste management facility without a permit, in violation of 6 NYCRR §3601.7(a)(1)(ii). Respondent Mt. Hope's receipt, storage and processing of petroleum-contaminated soil from sites in the State of New Jersey, absent a solid waste management facility permit constituted operation of a solid waste management facility without a permit, a violation of 6 NYCRR §360-1.7 (a)(1)(ii), a continuing violation of 6 NYCRR §360-1.7(a)(1)(ii), from November 17, 1991 to September 17, 1992.

The Falsified Ideal Aluminum Analytical Report

16. Respondent Mt. Hope prepared the falsified analytical report and falsified Parish's signature regarding the Ideal Aluminum site.

17. Respondent Mt. Hope is responsible for the false report and false signature as a matter of law, since either Mt. Hope or its agent created the falsified document.

18. However, Staff failed to establish a record through Parish, or any other witness, challenging the authenticity of the other 35 exhibits in the series. Exhibits 163 through 198.

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19. Exhibit 8, an internal. Departmental memorandum, does not constitute a generic beneficial use determination because by its own terms, the memorandum *requires* a determination whether or not the activity conforms with the generic beneficial use criteria identified in the memorandum.

20. When Respondent Mt. Hope violated Special Conditions (4)(B) and (5)(B) of the permit to construct the afterburner, it violated 6 NYCRR §201.2(d) . Those activities were beyond the scope of authority of the BUD and required a SWMF permit.

The Petroleum Discharge

21. For purposes of NL §173, Staff need not prove that discharged petroleum constituents did, in fact, flow into the groundwater.

22. Respondents' challenges to sampling methodology are rejected.

23. All three variations to the 8240 EPA methodology employed by SCDOHS Chemist Amendola in analyzing the five samples, would, if anything, result in a false low test result, thereby indicating a lesser presence of petroleum constituents than would analysis of that sample under the EPA recommended methodology without variation.

24. Respondents' speculative contentions regarding asphalt contamination as a result of rain run-off into the test pits, or asphalt particles falling into the test pits, is rejected in light of the detailed sampling process described in the record. Rainfall during field sample collection had no impact on the soil that was being sampled.

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25. An adequate chain of custody was maintained for samples 6MF, 7MF, 18MF, 20MF and 21MF.

26. The phrase "Some surrogate standard values are below acceptable levels", stamped on some analysis results, means that the full surrogate level was not identified in the test result. Therefore, those test results probably under-report presence of substances for which the test was intended. Thus, the stamped language on a sample result indicates that the results obtained by the laboratory are an under-representation of the actual petroleum contamination level in the sample.

27. A petroleum discharge occurred during Mt. Hope's tenure at the site. This ongoing discharge of petroleum constitutes a continuing violation of NL §173 from at least September 16, 1993 to the present.

28. The fact that the discharge may have been petroleum-contaminated soil as opposed to a liquid form of petroleum is not relevant. Analysis of the five SCDOHS samples demonstrates a petroleum discharge occurred at the facility at some time prior to the date of sample collection.

29. Staff's contention that Respondent Mt. Hope took specific intentional or deliberate acts causing the discharge is rejected.

30. Respondents' failure to report the spill to the Department constitutes a violation of NL §175 and 6 NYCRR §613.8.

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Respondent Petrosky

31. Respondent Frank Petrosky was President and day-to-day manager of Mt. Hope Asphalt Corp. He was a high managerial agent of corporate Respondent Mt. Hope, and was in a position to prevent the corporate violations that occurred regarding receipt and processing of contaminated soil from New Jersey sites.

32. Therefore, Respondent Frank Petrosky is liable for the violations of the corporation both in his capacity as President of Mt. Hope and also individually.

DISCUSSION

I. *Applicable Statutory and Regulatory Provisions*

Jurisdiction and authority to initiate this administrative action is based upon Environmental Conservation Law §3-0301. (1)(i), (l), (m), (n) and (o), ECL §3-0301(2)(h), ECL Articles 17, 19, 27 and 71 and Navigation Law, Article 12.

ECL §17-.0501(1) provides that it is unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to ECL §17-0301.

ECL §27-0707 provides that no person shall commence operation, including site preparation and construction, of a new solid waste management facility until such person has obtained a permit pursuant: to ECL Article 27, Title 7.

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NL §172(8) and 6 NYCRR §613.1(8) provide that a discharge is any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state.

NL §173 provides that the discharge of petroleum is prohibited.

NL §175 provides that any person responsible for causing a discharge shall immediately notify the Department pursuant to the rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of §192.

6 NYCRR Part 201.2(d) provides that a person who owns or operates an air contamination source shall construct, modify, test, install and operate such source in accordance with all conditions of the applicable permit to construct or certificate to operate.

6 NYCRR §360-1.2(a)(2)(i) provides that, "material is discarded if it is abandoned by being (i) disposed of".

6 NYCRR §360-1.2(a)(3) provides that "[A] material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water".

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6 NYCRR §360-1.2(a)(4)(vii) states that materials that the Department has determined are being beneficially used, including materials that are incorporated into a manufacturing process to produce a marketable product, are not solid waste for the purposes of 6 NYCRR Part 360. (eff. December 31, 1988 to October 8, 1993; *compare*, current 6 NYCRR §360-1.2(a)(4)(vii)).

6 NYCRR §360-1.2(b)(145) A solid waste management facility is defined as "any facility" employed beyond the initial solid waste collection process and managing solid waste . . .". Solid waste is defined as "all putrescible and nonputrescible materials or substances, except as described in paragraph (4) of this subdivision, that are discarded or rejected . . ." (6 NYCRR §360-1.2(a)(1)

6 NYCRR §360-1.5(a) provides that no person shall dispose of solid waste in the State of New York, except at a disposal facility exempt from the requirements of Part 360, or a disposal facility authorized to accept such waste.

6 NYCRR §360-1.7(a)(1)(ii) provides that no person shall operate a solid waste management facility, except in accordance with a valid permit to operate that facility issued pursuant to 6 NYCRR Part 360, except as otherwise provided in Part 360,

II. *The Relationship Between Mt. Hope and Disposal Technologies, Inc.*

Respondents assert that Disposal Technologies, Inc. ("Disposal Technologies") and its principal, Thomas Accardi ("Accardi"; collectively, "Disposal Technologies"), never acted as agents for Mt. Hope, but instead were independent

contractors. Respondents further assert that Disposal Technologies was solely responsible for preparation of the incomplete quarterly reports, and that Respondents were not aware of any omission in the reports.

Lastly, Respondents assert that when they learned that Thomas Accardi/Disposal Technologies, Inc. had been misrepresenting other business information to them, Respondents terminated the Mt. Hope-Accardi/Disposal Technologies relationship. Therefore, Respondents conclude they should not be penalized or suffer loss of their authority to operate the Mt. Hope facility, due to illegal acts or omissions of Accardi/Disposal Technologies.

Dissolution of this relationship was a condition of the January, 1993 Mt. Hope Consent Order. However, during the time period at issue for the 39 New Jersey transactions alleged in the Complaint, the Mt. Hope-Disposal Technologies relationship did exist. In February, 1991 Mt. Hope identified Disposal Technologies, Inc. and Accardi as its consultant. Subsequently, Mt. Hope authorized Disposal Technologies to prepare and submit the quarterly reports on behalf of Mt. Hope. It is undisputed that the quarterly reports at issue were prepared by Disposal Technologies from information either developed by Disposal Technologies from Mt. Hope's records, or provided by Respondent Mt. Hope.

Whether the quarterly reports were prepared or filed by a member of the Disposal Technologies' staff or the Mt. Hope Asphalt staff is irrelevant at law. Respondent Mt. Hope, the permittee, is solely responsible for assuring compliance with all applicable laws, regulations and permit conditions associated with its asphalt operation. *NYSDEC v. Ten Mile-River Holding,*

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Ltd., M.A.C. Sand and Gravel, Inc. and Aldo Colella, Decision of the Commissioner, August 11, 1994 [It is immaterial whether MAC is characterized as an agent or as an independent contractor. Very simply put, TMR as the permittee is primarily responsible for assuring compliance with all applicable laws, regulations and permit conditions associated with its mining operation].

Regardless of whether the Mt. Hope-Disposal Technologies relationship may have dissolved at some future time, during the time period at issue in the Complaint, Thomas Accardi and Disposal Technologies, Inc. were agents for Respondent Mt. Hope, as discussed above. Disposal Technologies, through Accardi, attended meetings with Staff on behalf of Respondent Mt. Hope. During Katy Murphy's nine site visits, she usually met with Respondent Petrosky, sometimes with Accardi. In addition, Disposal Technologies (and Accardi) maintained offices in the series of interconnected trailers located at Mt. Hope's facility, which also housed Mt. Hope. Mt. Hope and Disposal Technologies were the sole business entities located at Mt. Hope's facility.

Respondents assert that the mere fact they offered no explanation as to why they submitted incomplete quarterly reports, identifying only New York materials, does not establish intent. Respondents assert they may reasonably have had legitimate business purposes for maintaining such records. However, also in evidence is proof that Respondent Mt. Hope falsified spill numbers to give the impression that only spills identified by a NYSDEC Spill Number were being brought into the facility. A review of Exhibits 163 through 198 shows that these fabricated spill numbers initially appeared on documents generated by Disposal Technologies. However, even if Mt.

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Hope employees unwittingly copied these seven digit "spill numbers" from the Disposal Technologies documents into the log book maintained by Mt. Hope, Mt. Hope is responsible for the acts of Accardi/Disposal Technologies.

Kathleen Morrison, a Mt. Hope employee, testified that when Murphy conducted site visits at the facility and reviewed logbooks, Murphy would be shown the original logbooks[5]. The logbooks are contemporaneous records that identify the type of material received by the facility, the site the material came from and the quantity of material received on the dates indicated. The third column in Exhibit 84 indicates "NYSDEC Spill No." and lists a seven digit spill number for each entry, including entries for materials Respondent Mt. Hope received from the State of New Jersey[6]. The second column in Exhibit 86 indicates "Spill No." and lists a seven digit spill number for each entry for materials accepted from the State of New Jersey[7].

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5. Exhibits 84 and 86 are photocopies of the original documents.

6. For example, Exhibit 84, page 2, line 6 (matching Exhibit 165) page 2, lines 17 and 18 (matching Exhibit 163), page 2, line 22 (matching exhibit 164), page 2, line 36 (matching Exhibit 166), page 3, line 9 (matching Exhibit 167), page 3, line 10 (matching Exhibit 168), page 3, line 15 (matching Exhibit 169), page 3, line 16 (matching Exhibit 170), page 4, line 3 (matching Exhibit 173), page 4, line 5 (matching Exhibit 172), page 4, line 12 (matching Exhibit 174), page 4, line 13 (matching Exhibit 175), page 4, line 18 (matching Exhibit 177), page 4. line 19 (matching Exhibit 176), page 4, lines 26 and 29 (matching Exhibit 171), page 4, line 34 (matching Exhibit 180), page 4, line 37 (matching Exhibit 179), page 4, line 41 (matching Exhibit 181) and page 5, line 13 (matching Exhibit 178)).

7. For example, Exhibit 86, page 2, lines 14 and 26 (matching Exhibit 189), page 3, line 6 (matching Exhibit 191), page 3, line 10

(Cont'd)

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The Department issues seven digit spill numbers, whereas the State of New Jersey does not.

Respondent Mt. Hope (or Disposal Technologies, Inc.) fabricated these spill numbers. The spill numbers were not issued by the New York State Department of Environmental Conservation. Furthermore, the spill numbers are not legitimate spill numbers issued by the New Jersey State Department of Environmental Protection. Respondents provided no explanation for these fabricated spill numbers, other than to assert that Accardi/Disposal Technologies created the fabricated numbers, autonomously, as part of their plan to deceive both Mt. Hope and the Department.

Further, Respondent Mt. Hope fabricated the spill, numbers, with the intent to deceive the Staff members who might inspect the log books. When Department personnel reviewed the log books maintained at the facility, they saw seven digit numbers appearing to be NYSDEC spill numbers and presumed that Respondent Mt. Hope was only accepting petroleum-contaminated soil from sites located in the State of New York, in conformance with its permit.

Therefore, even if Respondents' argument is accepted that Accardi/Disposal Technologies filed incomplete quarterly reports absent Respondents' knowledge or consent, Respondent Mt. Hope is liable for Accardi's acts. Whether in fact it was

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(Cont'd)
(matching Exhibit 192), page 3, line 26 (matching Exhibit 193), page 3, line 30 (matching Exhibit 190), page 5, line 9 (matching Exhibit 194), page 5, line 17 (matching Exhibit 195), page 5, line 25 and page 17, line 13 (matching Exhibit 196), page 15, line 2 (matching Exhibit 197), and page 17, line 25 (matching Exhibit 198).

Respondent Mt. Hope or Thomas Accardi/Disposal Technologies, Inc., that fabricated the seven digit spill numbers resembling legitimate NYSDEC spill numbers for the 36 New Jersey sites listed in Mt. Hope's logbooks, Respondent Mt. Hope is ultimately liable, as a matter of law.

III. *The Enforcement Action*

The Stipulations

The parties agreed to two factual stipulations during the hearing. The first stipulation concerned the admission into evidence of 27 exhibits which allegedly constituted analytical reports of shipments of soil originating from the State of New Jersey that had been received at Mt. Hope's Calverton facility. These analytical reports constitute pre-marked Exhibits 169-198, in evidence, excluding Exhibits 172 and 198. The parties stipulated that those 27 exhibits were maintained as business records in the offices of Respondent Mt. Hope and had been removed from those offices by the Suffolk County District Attorney. Also, the parties stipulated that all of the analytical reports (Exhibits 163 through 198), except for Exhibits 169, 171, 180 and 182, contained laboratory analyses which indicated that all material was nonhazardous pursuant to the Quality Assurance/Quality Control, (QA/QC) provisions of the Permit to Construct EP2. Further, all the analyses were conducted by a New York certified laboratory. With respect to Exhibits 169, 171, 180 and 182, Respondents asserted that the original reports maintained at Mt. Hope's offices had contained laboratory analyses, but the copies received back from the District Attorney's Office by Staff lacked copies of those analyses.

The second stipulation entered into by the parties concerned Exhibit No. 312, an affidavit of John Strong of the State of

New Jersey Department of Environmental Protection. In sum and substance, the affidavit states that the New Jersey Department of Environmental Protection does not utilize a system which contains a 7-digit spill number. The parties stipulated that: (1) a New Jersey case number is not assigned to all sites where petroleum-contaminated soil is generated; (2) New Jersey Department of Environmental Protection approval is required prior to any transportation of petroleum-contaminated soil from the State of New Jersey, and (3) the office that oversees the disposal of petroleum-contaminated soil outside of the State of New Jersey does not require the assignment of a New Jersey DEP case number.

A. *The Charge of Violation of ECL Article 19, and 6 NYCRR Part 201*

1. Alleged Violation of ECL Article 19, 6 NYCRR §201.2(d) and Permit to Construct (EP2, the afterburner), Special Permit Condition (4)(B), by Respondents' receipt and/or processing on 39 occasions of contaminated soil from sites located in the State of New Jersey which did not have a NYSDEC-assigned spill number.

Staff alleges in Complaint §B that Respondents received and/or processed contaminated soil from sites located in the State of New Jersey which did not have a NYSDEC-assigned spill number on 39 occasions from on or about November 13, 1991 to on or about September 17, 1992. (The 39 occasions identified in the Complaint are identified in Hearing Report Appendix A).

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6 NYCRR Part 201 is promulgated pursuant to ECL Article 19[8]. Respondents are both "persons" *within the* meaning of ECL §19-0107. Pursuant to 6 NYCRR §201.2(d), "a person who owns or operates an air contamination source shall construct, modify, test, install and operate such source in accordance with all conditions of the applicable permit to construct or certificate to operate." Staff asserts that Respondents did not construct, test, install and operate their afterburner, an air contamination source, in accordance with Respondent Mt. Hope's August 7, 1991 Permit to Construct EP2, because they regularly violated special condition (4)(B) of that permit[9].

Special Condition (4)(B) of Respondent Mt. Hope's Permit to Construct an afterburner (Permit #1-473-00135/00002-0, hereinafter referred to as "Permit to Construct the afterburner" or "Permit to Construct EP2") provides at page 6, that "[o]nly contaminated soil from sites identified by a NYSDEC assigned spill number shall be processed at the facility".

Staff asserts that the limitation created by Special Condition (4)(B) was necessary, to assure Staff would be able to review all necessary information regarding the source and constituents of petroleum-contaminated soil to be received and processed at the facility. Staff asserts it would thereby be able to control the risks that Respondents' operation would otherwise pose to human health and the environment.

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8. *See* ECL §19-0301 and §19-0305, respectively.

9. The permit number of the Permit to Construct EP2, was changed on June 2, 1992, to #1-4722-01052/00001-0.

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Respondents' Affirmative Defense

However, Respondents assert an affirmative defense that the Permit to Construct EP2 created two distinct categories of authority for operation of the facility; one category of "operation for testing purposes" and another category of "operation for preparation for stack testing". Subsequent to issuance of the EP2 Permit to Construct, a second stack test of the facility with its afterburner (EP2) installed, was conducted on August 26, 1992[10].

The first page of the permit states, under the caption "Description of Authorized Activity":

> Construct and test emission point 00002, an air oxidation unit (afterburner), for the purpose of reducing air emissions from existing asphalt facility and to allow use of petroleum-contaminated soil as aggregate. The new emission point will replace existing emission point 00001. *Operate emission point 00002 for the purposes of preparation for stack text (sic).* (emphasis added).

The caption identifying Special Condition Section (4) is "Operation for Testing Purposes". Respondents assert that this heading limits the scope of Special Condition (4)(B), to "operation of the facility for testing purposes", as opposed to authority granted by the first page of the permit, "operation in preparation for testing".

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10. Prior to issuance of the Permit to Construct EP2, a two-day stack test was conducted at the facility on November 7 and 9, 1990.

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Respondents assert that the only restriction placed upon Mt. Hope under Special Condition (4)(B) concerns that soil which was to be used during Mt. Hope's actual stack test(s). They assert the Permit to Construct EP2 did not restrict all receipt and processing of contaminated soil to that which had a NYSDEC spill number assigned to the site of origination of the soil. Instead, Respondents assert that authority granted by the first page of the permit authorized Mt. Hope to generally operate utilizing non-hazardous petroleum-contaminated soil irrespective of source of origin.

Respondents further assert that the authority granted by Special Condition (4)(B), read together with the heading to Special Condition Section (4), limited Mt. Hope to specific chemical compounds to be present in the soils which were to be a part of the stack test only, to ensure that emission test data obtained would be as broad as possible.

Lastly, Respondents assert that Staff presented no evidence to establish that Mt. Hope did not comply with the provisions of Special Condition (4)(B) during the August 26, 1992 stack test. Therefore, Respondents conclude that Staff failed to prove that there was noncompliance with Special Condition (4)(B).

In response, Staff asserts that Special Condition Section (3), entitled "Emission Testing and Certificate to Operate Application"[11] identifies conditions applying to the stack testing procedure, and that Section (4) applies to all authorized activities, generally.

Staff asserts that the heading for permit Section 4 was created to clarify to the permittee, Respondent Mt. Hope, that

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11. Exhibit 135, Permit to Construct, page 4.

the Permit to Construct EP2 was not to be construed for any operations other than for preparing for the afterburner stack test and conducting that stack test. Additionally, Staff asserts the Section 4 heading was created to clarify that any further operation would not be authorized because the permit issued to Respondent Mt. Hope was not a Certificate to Operate, but instead, a Permit to Construct. Finally, Staff asserts the evidence shows that at no time did any staff member authorize Respondents to receive, store or process petroleum-contaminated soil from New Jersey. Further, Staff granted no permit variance or modification. The expiration date of the Permit to Construct EP2 was August 6, 1992. At Respondents' request, Staff amended the permit by extending the expiration date to September 21, 1992, to provide Respondents additional time to conduct the stack test. That permit amendment stated: "No modification of permit or special conditions."[12] Therefore, the amendment to the Permit to Construct EP2 was limited to an extension of the permit's time period, and did not affect other substantive conditions of the permit.

Respondents' affirmative defense that Special Condition (4) (B) only applied to stack tests is without merit because the distinction drawn by Respondents is misplaced. Respondents understood that the permit issued was a Permit to Construct, not the Certificate to operate which they hoped to obtain at some future date. The permit conditions, when read as a whole, are reasonably construed to mean that "authority for operation to prepare for stack testing" is within the broader authority to "performing the stack test". Accordingly, the limitations and requirements set forth in the Permit to Construct EP2, Special

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12. Exhibit 146.

Condition (4)(B), applied to Respondents' operation of the facility throughout the period during which the permit was valid.

By analogy to statutory construction, the title is not part of the statute. *People ex rel. Commonwealth Insurance Co. v Coleman*, 121 NY 542, 25 NE 51 (1890); *Petition of Trustees of New York & Brooklyn Bridge*, 72 NY 527 (1878); *People ex rel. Cucinatta v Burger*, 54 Misc. 2d 92 (1967); *National Enerdrill Corp v Crown Drilling, Inc.*, 119 Misc. 2d 162 (1983). The text of a statute must take precedence over the title; the title should not be used to nullify or limit the text of the statute. *Squadrito v Griebsch*, 1 NY2d 471, 136 NE2d 504 (1956); *People v Arriaga*, 45 Misc. 2d 399 (1965); *Neumann v New York*, 137 AD 55 (1910); *Wells v New York State Department of Transportation*, 90 Misc. 2d 535; *Morabito v Hagerman Fire District*, 128 Misc. 2d 340 (1985).

Lastly, Paragraph (B)(6) of the Second Amended Complaint alleges a violation for "receipt and/or processing". Respondents assert that Special Condition (4)(B) does not contain a prohibition as to "receipt" of contaminated soil, but only as to "processing". Respondents conclude that no violation can be attributed to Mt. Hope based upon noncompliance with Special Condition (4)(B) for "receipt" of contaminated soil.

This allegation does not create separate liability for "receipt" and for "processing". However, "processing" reasonably includes "receipt" for purposes of processing. Therefore, if Respondents received the materials for processing, then Staff's allegations based upon noncompliance with Special Condition (4)(B) are proper. If Respondents received the materials for some purpose other than processing, they were acting outside the authority of the Beneficial Use

Determination, unless they could show otherwise, as discussed in Report Section B, below, and therefore were in violation of ECL Article 27 and 6 NYCRR Part 360.

The 39 New Jersey Sites

Staff's allegations identify 39 New Jersey sites, and essentially allege one transaction of receipt of contaminated soil from each site. However, Respondents explained at hearing that they refer to each generator of contaminated soil, by site, as one "job". Respondents further explained that they would normally receive a number of shipments of contaminated soil over a period of days or weeks, for each "Job" or site. Therefore, Staff's allegations, identifying 39 New Jersey sites, potentially represent more than 39 occasions of receipt by Mt. Hope of petroleum-contaminated soil. However, since Staff did not allege multiple occasions of receipt by Respondent Mt. Hope for any particular "Job" or site, each "job" (or site) identified in the Complaint is taken to represent an allegation of one incident of receipt of petroleum-contaminated soil, even though the record establishes that for certain sites, Respondent Mt. Hope did, in fact, receive a number of shipments of contaminated soil over a period of days or weeks.

Staff presented documentary evidence at hearing showing that on at least 36 occasions Mt. Hope accepted and processed petroleum contaminated soil from sites located in New Jersey[13].

Respondent Mt. Hope concedes that it received and processed petroleum-contaminated soil from New Jersey in 33 of 39 incidents alleged in the Complaint, and further, that for

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13. Exhibits 163-198.

those 33 incidents soil did not originate from a site identified by a NYSDEC spill number.

Exhibits 163 through 198 contain documentation, including receipts for petroleum-contaminated soil for each of the 36 sites. These receipts each contain a Disposal Technologies Inc. logo on top and a statement toward the bottom that the "Disposal Facility" is Mount Hope Asphalt. These exhibits also contain non-hazardous material manifests which state that the contaminated soil is "destined for recycling"[14]. Exhibits 194, 195 and 198 include certifications by Frank Petrosky stating that the petroleum-contaminated soil indicated therein was recycled and made into "road paving materials".

Respondents' witness, Jay Boyle, admitted that Mt. Hope processed petroleum-contaminated soil from New Jersey sites until Respondents received Robert Becherer's August 28, 1992 reply to Respondents' request to accept petroleum-contaminated soil from a certain New Jersey site referred to as the Picatinny Arsenal site. Finally, Mt. Hope's logbooks indicate receipt of petroleum-contaminated soil from 36 New Jersey sites. Based on this evidence, it reasonable to conclude that for the 36 New Jersey job sites identified in Exhibits 163 through 198, petroleum-contaminated soil from the State of New Jersey was received and processed by Respondent Mt. Hope.

Staff asserts that for the 36 incidents identified by Exhibits 163 through 198, the petroleum-contaminated soil was not identified by a NYSDEC-assigned spill number, because the Department does not issue spill numbers for spills occurring outside the State of New York. Staff further asserts that Exhibits 199 and 312 show that the spill numbers used by Respondents

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14. See, for example, Exhibit 163, page 5.

in their logbooks and files are false, and were fabricated by Respondents to create the appearance that Respondents were operating within the authority of their permit. Exhibit 199 is an affidavit of Departmental employee Angela Chieco, Environmental Engineer II, stating in sum and substance that she is the Department's spill file database custodian, and providing the actual spill locations within New York State, for which spill numbers identified in Exhibits 163 through 198 were actually assigned. Exhibit 312 is an affidavit of New Jersey Department of Environmental Protection employee John Strong which states, in sum and substance, that New Jersey Department of Environmental Protection does not utilize a system which contains a seven-digit spill number.

In the Permit to Construct EP2, the requirement of a "NYSDEC assigned spill number" means that the Department Staff must be the source of origin for the spill number. Consequently, in Exhibit 84, as in other documentary evidence in this consolidated action, seven digit spill numbers purportedly identifying New Jersey petroleum-contaminated soil have been fabricated by Respondent Mt. Hope. Further, the seven digit numbers appearing in the column heading "NYSDEC SPILL No." are not spill numbers issued by the State of New Jersey, because, New Jersey has never issued seven digit spill numbers, and since 1991 has issued only ten, eleven or twelve digit spill numbers. Respondent Mt. Hope has assigned fabricated spill numbers to all New Jersey jobs identified in Exhibit 84, under a column heading indicating "NYSDEC SPILL No."

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2. Alleged violation of ECL Article 19, and 6 NYCRR §201.2(d) and Permit to Construct (EP2), Special Permit Conditions (5)(B) and (5)(E), by failure to maintain, and failure to submit to the Department on a quarterly basis, logs which contained entries for each of the 39 instances described in the first alleged violation.

Special Condition (5)(B) of Mt. Hope's permit to construct an afterburner provides at page 5, in pertinent part, that:

> "A log containing an entry for *each delivery of contaminated soil to the facility* must be maintained. Within 30 days of the end of each calendar quarter, a *copy of the log* must be submitted to the NYSDEC . . . Each log entry must include the following items:
>
> 1. NYSDEC spill number, and name of involved individual from NYSDEC oil spill response team;
> 2. Location of spill site;
> 3. Quantity of soil to be removed;
> 4. Type of fuel contaminating the soil;
> 5. Source and method of contamination;
> 6. Name and address of facility where spill occurred;
> 7. Total percent hydrocarbons;
> 8. Copy of sample analysis;
> 9. Shipping papers showing the following items . . .

(emphasis added).

Special Condition (5)(E) of Mt. Hope's permit to construct an afterburner provides at page 5, in pertinent part, that all records required by the permit must be kept on-site at the facility and must be available for inspection by Staff.

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During the hearing, for purposes of clarification, the parties referred to the handwritten logs maintained at Mt. Hope's facility as the "log books" and referred to the quarterly log submittals required to be filed with Staff as the "quarterly reports". However, under Special Permit condition (5)(B), the identical information kept in Respondent Mt. Hope's log book was required to be submitted to Department Staff in the quarterly reports. Thus, this permit condition sets forth the requirement that all information being maintained by Respondent Mt. Hope in its log book was to be submitted at quarterly intervals to Department Staff as Respondent Mt. Hope's quarterly report for that time period.

Mt. Hope's logbooks for the time period at issue were required to be reported to Staff during three calendar quarters. Exhibits 212 A, B and C, are the quarterly reports submitted by Respondents to Staff (August 15, 1991 to March 31, 1992; April 1, 1992 to June 30, 1992; and July 1, 1992 to September 30, 1992, respectively). These quarterly reports do not contain any entries indicating that Mt. Hope received and processed petroleum-contaminated soil from New Jersey on 36 occasions between November 1991 and September 1992. However, Mt. Hope's log books do contain those New Jersey entries. Exhibits 84 and 86. Therefore, although Respondent Mt. Hope was required to submit quarterly reports to the Department indicating all petroleum-contaminated soil deliveries to the facility, Mt. Hope excluded the 36 New Jersey entries from its submittals in violation of Special Condition (5) (B) of the Permit to Construct (and consequently, 6 NYCRR §201.2[d]).

Respondents assert that Robert Becherer specifically instructed Mt. Hope not to file many documents required under the Permit to Construct, including the quarterly reports, because

documents submitted were too voluminous. However, the record shows that Becherer instructed Respondents not to file copies of sample analyses and shipping papers, required by Special Permit condition (5)(B)(8) and (9).

Regarding Special Condition (5)(E), Staff has failed to show that all documents were not maintained on-site and available for Staff inspection. In fact, the record is quite clear that on a number of occasions, Murphy inspected the logbooks and viewed pages indicating receipt of petroleum-contaminated soil from New Jersey sites.

Concededly, special Permit Condition (5)(B) does not distinguish between the log required to be maintained at the facility pursuant to Special Permit Conditions (5)(B) and (E), and documents required to be submitted with the log under Special Condition (5)(B)(8) and (9). Still, the record does not establish that Becherer instructed Respondents not to file quarterly reports, required by Special Permit Condition (5)(B). Instead, Becherer instructed Respondents that copies of certain supporting documentation required to be filed with the quarterly report — *i.e.*, copies of sample analyses and shipping papers — need not be submitted because that documentation became too voluminous[15].

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15. Nonetheless, even with respect to sample analyses and shipping papers, if Respondents intended to rely upon Becherer's instructions in contradiction to Special Permit Condition (5)(B)(8) and (9), Respondents should have sought a permit modification to omit. the filing requirements of Condition (5)(B)(8) and (9).

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B. *The Charge of Violation of ECL Article 27 and 6 NYCRR Part 360*

1. Alleged violation of ECL 527-0707 and 6 NYCRR 360-1.7.

Staff's Alternative Theory of Liability

Staff asserts that Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, by operating a solid waste management facility ("SWMF") without a permit, by receipt and/or processing and/or disposal of contaminated soil from New Jersey on the above referenced 39 occasions.

The First Ruling on pre-trial motions, dated June 22, 1994, held:

> A BUD is a determination by Staff that a particular waste stream or product made from a waste stream is a beneficial use of that waste. *National Tire Compaction Service, Inc.* (Commissioner Decision, June 18, 1993 . . .). A BUD is not a permit but instead is a determination by Staff which essentially exempts or excepts the activities or processes constituting the beneficial use from the 6 NYCRR 360 solid waste permit requirements. Therefore it is logically inconsistent that a violation of Part 360 (or any other Departmental regulation) would affect the determination of beneficial use. As such, the BUD itself cannot be violated.

The First Ruling directed Staff to amend its theory of liability in Complaint §C, consistent with the above ruling. In

its amended cause of action (Complaint §C), Staff alleges alternative theories of liability, thereby preserving its original theory of liability for review by the Commissioner. Staff relies upon the precedent *In the Matter of Carlson Associates, et al.* (Commissioner's Decision, September 1, 1993) in asserting its pleading in the alternative. Accordingly, Staff asserts that these activities were in violation of the Beneficial Use Determination ("BUD") issued to Respondent Mt. Hope on August 9, 1991 (Staff's original theory of liability, asserting that Respondents violated the BUD); or alternatively, that Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, because the BUD did not contemplate receipt and/or processing and/or disposal of any material that Respondents received from August 7, 1991 to September 15, 1993 (Staff's amended theory of liability, pursuant to the First Ruling, that Respondents' activities were outside the authority of the BUD and, therefore, constituted operation of a solid waste management facility without a permit).

Respondents contend that the only difference between the two alternative pleadings, is that in the latter alternative Staff alleges that a continuing violation occurred as a result of Respondent Mt. Hope's receipt of soil from New Jersey. Respondents assert that Staff's theory in alleging a continuing violation is in error, and that *Carlson Associates* is not applicable to the present action, but is only applicable with regard to jurisdictional penalty amounts under Article 23 of the ECL. Respondents further assert that there is no similarity in the regulatory penalty scheme between Article 23 and Article 27 of the ECL.

Respondents correctly assert that *Carlson Associates* is not a precedent regarding computation of penalty. Still, the

provisions of ECL Article 71 are relevant and do provide for a continuing violation of ECL Article 27. ECL §71-2703(1). Therefore, Staff may properly assert a continuing violation of Article 27. Staff has asserted a continuing violation of ECL §27-0707 and 6 NYCRR 360-1.7, for operating a solid waste management facility without a permit from November 17, 1991 (the first date of receipt of soil from a New Jersey site) to September 17, 1992 (the last date of receipt of soil from a New Jersey site).

* * *

6 NYCRR §360-1.2(a)(4)(vii) in effect during the period of time at issue states:

> "(4) The following are not solid waste for the purposes of this Part:
>
> (vii) materials that the department has determined are being beneficially used, including the following:
>
> (a) materials that are incorporated into a manufacturing process to produce a marketable product . . ."

By letter dated August 9, 1991 Respondent Mt. Hope received a Beneficial Use Determination ("BUD") from Department Staff. This letter is also the cover letter to Respondent Mt. Hope's Permit to Construct EP2. The letter specifically refers to the enclosed Permit to Construct EP2, in two numbered paragraphs. Pursuant to numbered paragraph (1) of the letter, "[a]ll operations will be conducted in accordance with 6 NYCRR Parts . . . 201, . . ." This language makes

compliance with requirements of 6 NYCRR §201.2(d) a necessary condition of the beneficial use determination.

6 NYCRR §201.2(d) required Respondents to comply with all conditions of Mt. Hope's Permit to Construct EP2. Therefore, compliance with the Permit to Construct was a condition upon which the Beneficial Use Determination was made. Respondents' receipt, storage and processing of petroleum-contaminated soil from sites in New Jersey was not authorized by the Permit to Construct EP2, and consequently, was not within the scope of authority of the Beneficial Use Determination made by Department Staff.

Numbered paragraph (2) of the August 9, 1991 cover letter also requires Respondents to comply with the conditions of the attached Permit to Construct EP2:

> "The contaminated soils will be tested and shown not to be hazardous wastes under all federal and New York State definitions. This will be done *pursuant to special conditions of the Air Permit.*"

(emphasis added).

The one Special Condition section of the permit that discusses testing of petroleum-contaminated soil is Special Condition Section 4. Special Condition (4)(B) requires that "[o]nly contaminated soil from sites identified by a NYSDEC assigned spill number shall be processed at the facility." Therefore, when Respondent Mt. Hope accepted and processed petroleum-contaminated soil from sites in New Jersey, Respondent Mt. Hope was in violation of Special Condition (4)(B) and consequently, was engaging in activities beyond the scope of authority of the BUD.

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A solid waste management facility is defined as any facility employed beyond the initial solid waste collection process and managing solid waste. 6 NYCRR §360-1.2(b) (145). Solid waste is defined as all putrescible and nonputrescible materials or substances that are discarded or rejected [except as described in paragraph (4) of that subdivision]. 6 NYCRR §360-1.2(a) (1) material is discarded if it is abandoned by being disposed of. 6 NYCRR §36-1.2[a][2][i]. A material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water. 6 NYCRR §360-1.2(a)(3). Petroleum-contaminated soil is a solid waste because petroleum product has been discharged into land to form the petroleum-contaminated soil.

As discussed above, Respondent Mt. Hope did not have authority under the BUD for its receipt, storage, processing or disposal of petroleum-contaminated soil from New Jersey sites. These activities would otherwise require a permit issued pursuant to ECL Article 27 and 6 NYCRR Part 360. Therefore, Mt. Hope was required to have a Part 360 permit for those activities.

Because Respondent Mt. Hope acted outside the scope of authority of the BUD, Mt. Hope operated a solid waste management facility without a permit, in violation of 6 NYCRR §360-1.7(a)(1)(ii). Thus, Respondent Mt. Hope's receipt (and processing) of petroleum-contaminated soil from sites in the State of New Jersey, absent a solid waste management facility permit, constituted operation of a solid waste management

facility without a permit, a continuing violation of 6 NYCRR §360-1.7(a)(1)(ii), from November 17, 1991 to September 17, 1992.

The Generic Beneficial Use Determination

Respondents assert that on November 29, 1990, the Department's Director of the Division of Solid Waste issued a generic Beneficial Use Determination for use of petroleum-contaminated soil as an aggregate in asphalt production. However, this document is an internal memorandum for intra-agency purposes from the Division Director to the Department Staff's Regional Solid Waste Engineers.

Although the subject of the memorandum is "Petroleum-contaminated soil Beneficial Use Determinations", the memorandum explicitly states that, "we recommend that a submittal be made to identify the project and to verify the process details so as to give the Department an opportunity to *determine* whether or not the activity conforms with the generic beneficial use criteria or other Part 360 requirements." (emphasis added). This internal memorandum does not constitute a generic beneficial use determination because by its own terms, the memorandum requires a determination of whether or not the activity conforms with the generic beneficial use criteria identified in the memorandum.

In any event, even if Exhibit 8 were construed to be a generic BUD applicable to Mt. Hope, criteria 3 requires compliance with any other Departmental regulations, other than 6 NYCRR Part 360, which may apply. As discussed above, Respondent Mt. Hope has not complied with 6 NYCRR §201.2(d) and the terms of its Permit to Construct EP2.

Therefore, Mt. Hope's activities in receipt, storage and processing of petroleum-contaminated soil from 36 New Jersey sites, would be outside the scope of authority of the generic BUD.

The Parish Testimony

Respondents assert that Staff failed to prove the soils received from New Jersey were not non-hazardous, were not tested by a New York State certified lab, or that these soils differed in any way from soils received from the State of New York.

The Parish testimony puts into question the validity of certain documentation filed or maintained by Respondents under Parish's purported signature. Parish testified that he has been employed as President of Impact Environmental for approximately five years. In mid-1991, Impact Environmental was retained as a consultant to Disposal Technologies. Impact Environmental, in its consultant capacity to Disposal Technologies, performed sampling on behalf of Mt. Hope, and sent the samples to appropriate laboratories for analysis. Upon receiving the analysis from the lab, the analysis would be forwarded to Disposal Technologies under Parish's cover letter.

However, Parish testified with respect to at least one such packet of information, the analytical report (contained within a cover letter dated December 31, 1991) addressed to Disposal Technologies at the facility address contains what is purportedly his signature. In fact, it is not his signature.

The documentation in Exhibit 170, including the report, concerns material transported from the Ideal Aluminum site

("Ideal Aluminum"), 100 West 7th Street, Bayonne, New Jersey, to Mt. Hope,'s facility. The reported information states, "[b]ased on our investigation of 12-24-91 the contaminated material *is nonhazardous* pursuant to the standards promulgated by the New York State Department of Environmental Conservation. All information reported by the client was confirmed by either Freedom of Information Legislation and/ or inspection." Parish testified that the Ideal Aluminum analytical report was not prepared by his office, Impact Environmental. Because the report and signature are not genuine, it is impossible to know whether the material described in the analytical report was in fact non-hazardous.

The documentation comprising Exhibit 170 was maintained at the facility offices by Mt. Hope or Disposal Technologies. The falsified report is addressed from Richard Parish, Impact Environmental, to Disposal Technologies, Inc. Further, the report addresses materials received by Mt. Hope. Therefore, it is reasonable to conclude that Mt. Hope or Disposal Technologies, acting on Respondents' behalf, prepared the false report and falsified the Parish signature.

Respondents assert that Thomas Accardi/Disposal Technologies acted independently in falsifying the Ideal Aluminum analytical report. However, Respondents presented no evidence to support this theory. In any event, Respondent Mt. Hope is ultimately responsible for the false report and false signature, as a matter of law, since either Mt. Hope or its agent created the falsified document.

Staff asserts that based upon Parish's testimony regarding Exhibit 170, the veracity of analytical reports in evidence for all 36 proven incidents must be questioned. Staff asserts that it

is impossible to know whether the material described in each report was in fact non-hazardous. However, Staff failed to establish a record through Parish, or other witnesses, regarding the authenticity of the other exhibits in Exhibit series 163 through 198.

Further, Staff stipulated that all of the analytical reports for Exhibits 163 through 198, except for Exhibits 169, 171, 180 and 182, contained laboratory analyses which indicated that all material was non-hazardous pursuant to the Quality Assurance/Quality Control (QA/QC) provisions of the Permit to Construct EP2. Further, all the analyses were conducted by a New York certified laboratory. With respect to Exhibits 169, 171, 180 and 182, Respondents asserted that the original reports maintained at Mt. Hope's offices had contained laboratory analyses, but the copies received back from the District Attorney's office by Staff lacked copies of those analyses.

Therefore, except for the Ideal Aluminum analytical report (Exhibit 170), the other 35 analytical reports and signatures contained in Exhibits 163 through 198 are deemed to be genuine, as represented in the respective exhibits, not falsified. Regarding Exhibits 169, 171, 180 and 182, I credit Respondents' assertion that the original reports maintained at Mt. Hope's offices contained laboratory analyses, but the copies Staff obtained from the District Attorney's office lacked copies of those analyses.

In sum, with respect to the ECL Article 19 violations, when Respondent Mt. Hope violated Special Conditions (4)(B) and (5)(B) of the permit to construct the afterburner, it violated 6 NYCRR §201.2(d). Those activities — *i.e.*, receipt of petroleum-contaminated soil from New Jersey sites on 36

occasions and failure to include those 36 occasions in three quarterly reports to the Department — were beyond the scope of authority of the BUD and required a SWMF permit.

C. *Violation of Navigation Law Article 12, ECL Article 17 and 6 NYCRR Parts 360 and 613*

Staff does not seek any monetary penalty for this component of its Complaint, but instead seeks an order requiring further investigation and remediation by Respondents.

Members of the Suffolk County Department of Health Services, working with the office of the Suffolk County District Attorney, obtained samples at the facility on September 16, 1993. Staff asserts that the samples and sample analysis show that Respondents caused a discharge of petroleum through illegal burial and stockpiling of petroleum-contaminated soil at the facility, on or before September 16, 1993 and that, this constitutes a continuing violation.

1. Alleged violation of Navigation Law §173 by causing a discharge of petroleum at the Mt. Hope facility on or before September 16, 1993, a continuing violation.

A petroleum "discharge" is defined very broadly under the Navigation Law. Navigation Law ("NL") §173 provides that the discharge of petroleum is prohibited. NL §172(14) defines petroleum as oil or petroleum of any kind and in any form. NL §172(8) and 6 NYCRR §613.1(8) define a discharge as:

> any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of

> petroleum into the waters of the state or onto lands front which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state.

NL §175 provides that any person responsible for causing a discharge shall immediately notify the Department pursuant to the rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of §192[16].

Navigation Law §181(1) provides that any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in NL Article 12.

Respondents assert that the record does not support a finding that groundwater under the facility has been impacted or is threatened by Mt. Hope's activities. Therefore, Respondents conclude that Staff failed to meet its burden of proof on this cause of action.

In applying the above statutory and regulatory definitions, Staff need not prove that the petroleum constituents in the petroleum-contaminated soil did, in fact, flow into the groundwater. *Merrill Transport Co. v. State of New York,* 94 A.D.2d 39, 467 N.Y.S.2d 1030, *appeal denied,* 60 N.Y.2d 555,

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16. NYCRR §613.8 further requires that: [A]ny person with knowledge of a spill, leak or discharge of petroleum must report the incident to the Department within two (2) hours of discovery . . ."

467 N.Y.S.2d 1030 (while there is nothing in the record to positively demonstrate that the spilled oil might have flowed into protected waters, judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater); *See, Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dept. 1985) (there is no *need for* specific proof that the oil was ever in danger of seeping into protected water in order to *render the* above statutes applicable (referring to NL §§172 and 181)); *See, also, Bri-Mar Corp. v. Town Bd.* of *Town of Knox*, 145 A.D.2d 704, 534 N.Y.S.2d 831 (3d Dept. 1988) (the court distinguishes its decision in Merrill Transport from its decision in *State of New York v. Schenectady Chemicals*, 103 A.D.2d 33, 479 N.Y.S.2d 1010).

Respondents assert that for Staff to sustain their burden of proof under the Navigation Law claim, Staff must prove by a preponderance of the evidence that petroleum was, in fact, discharged; that Mt. Hope was responsible for this discharge; that Mt. Hope did not have a permit which authorized the alleged discharge; and that the petroleum was not in a controlled state in the environment and, therefore, had potential to seep through the ground into surface and ground water. *See, In the Matter of Peterson Petroleum, Inc.* (Commissioner's Decision, May 25, 1994); *See, also, In the Matter of Max Kent* (Commissioner's Decision, December 7, 1992). The parties' arguments are examined further below.

The Soil Samples

The SCDOHS collected many samples from the facility on September 16, 1993. Five of those samples at issue in this

proceeding are identified in the record as 6MF, 7MF, 18MF, 20MF and 21MF, Exhibit 207(a) through (e). Analytical results of the five samples obtained by SCDOHS at the facility show high levels of petroleum constituents in certain locations. Staff asserts that the analytical results are accurate and reliable and should be relied upon as establishing petroleum contamination in locations at the facility identified by the sampling results.

Respondent Mt. Hope asserts that Staff relies completely upon the samples and tests conducted by SCDOHS on those samples. Mt. Hope further asserts that the testimony of Olin Braids and testimony of Staff witnesses, supports a finding that no remediation is required. Respondent Mt. Hope asserts that evidence did not establish that petroleum was discharged.

Respondent Mt. Hope relies upon three factors in support of this position. First, Mt. Hope relies upon Braids' opinion that no definitive tests had been conducted to determine that there was any potential hazard to groundwater by contamination at the site. Secondly, Mt. Hope points to Braids' opinion that no contamination of the water table had occurred at the facility, based upon his review of monitoring well data. Lastly, Respondents assert that Braids' testimony was not controverted by any witness presented by Staff. Respondents' arguments are addressed more specifically below.

-Sampling Methodology

Respondent Mt. Hope's challenges to sampling methodology are invalid, and must be rejected. For example, Mt. Hope's assertion that improper sampling methodology was used which could have permitted particles of asphalt to taint samples, is speculative; Mt. Hope's assertion that samples were

maintained at warmer temperatures than required by sampling methodology would, if anything, result in greater violation of the samples and, therefore, a false-negative test result.

Additionally, the SCDOHS took many precautions to ensure proper sampling methodology was followed during the sampling collection process. A new bottle was used to collect each sample; the SCDOHS Sanitarian actually collecting the sample(s) wore two pair of gloves, and replaced the outer gloves after completing sample collection at each sample point; the back-hoe used to excavate sampling points was cleaned for decontamination at each sample point; and one of the two SCDOHS laboratory personnel were in physical custody of the samples, stored in a cooler, the entire day. Many photographs were taken to document the location of each sample point.

-Sampling Analysis

Respondent Mt. Hope also asserts that SCDOHS Laboratory staff varied methodology from standard EPA sampling analysis methodology, thereby invalidating practical quantification limits established for the standard tests. Respondent Mt. Hope asserts that variations from the EPA methodology render the test results suspect and not capable of confirmation. The lengthy, detailed EPA methodology includes use of a packed column, internal calibration and heating the sample to 40 degrees centigrade. However, SCDOHS Chemist Amendola employed three variations from the EPA 8240 methodology when analyzing the samples. He used a capillary column, as opposed to a packed column; he calculated the analysis using external calibration instead of internal calibration; and lastly, he did not heat the samples to 40 degrees centigrade.

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Nonetheless, Amendola concluded that the results of his analysis are accurate and reliable. He testified that the variation of use of a capillary column, as opposed to a packed variation column under the EPA 8240 methodology, is an acceptable practice, and in fact, was specifically approved by the New York State Department of Health as an acceptable variation from the EPA recommended methodology.

Regarding the calibration variation from EPA 8240 methodology, Amendola subsequently re-calculated the analysis of four of the five samples at issue using internal calibration. The four sample analyses re-computed using internal calibration resulted in a higher level of petroleum constituents, than did the external calibration results.

Lastly, heating the samples to 40 degrees centigrade, would have produced greater violation and would have yielded a slightly higher result than was obtained absent heating of the samples. In conclusion, all, three variations to the 8240 EPA methodology met with quality control standards of the New York State Department of Health, and would, if anything, result in a false low test result indicating a lesser presence of petroleum constituents.

-Chain of Custody

Respondents' claim that SCDOHS failed to maintain an adequate chain of custody for the five samples. In this case, Staff offers SCDOHS laboratory analysis of real evidence, the five soil samples at issue. The evidentiary issue of chain of custody requires that Staff demonstrate that SCDOHS accounted for the custody of the evidence from the moment

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SCDOHS personnel obtained the evidence until the moment SCDOHS personnel analyzed the evidence. Such evidence goes to weight of evidence and not to admissibility of evidence. *See, generally, People v Julian*, 41 NY2d 340, 360 NE2d 1310 (1977).

Once a SCDOHS Sanitarian obtained a sample, it was placed in a sample bottle. The Sanitarian sealed the sample bottle and cleaned the exterior, if necessary. The Sanitarian then handed the sample directly to SCDOHS laboratory personnel present, at the facility. The laboratory personnel received the samples from the Sanitarians. One of the two SCDOHS laboratory personnel were in physical custody of the samples, preserved in a cooler, during the entire day of sample collection.

After sample collection was completed at the site, the two SCDOHS laboratory personnel brought the sample cooler to the SCDOHS van, where they performed a final count of collected samples. Then the laboratory personnel transported the sample cooler, with samples, to the SCDOHS laboratory.

The laboratory documented receipt of the samples by entries in a SCDOHS laboratory logbook. Each sample was assigned a laboratory number, sealed in plastic and kept in a locked refrigerator, located in a locked "evidence room" at the laboratory. Finally, SCDOHS personnel completed "Chain of Custody" forms detailing exactly who had custody of the samples throughout the day.

Staff has demonstrated that an adequate chain of custody was maintained for the five samples at issue. Respondents' challenge to chain of custody is therefore rejected.

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-Other Challenges to Sampling and Analysis

Respondents assert that rainfall could have tainted the sampling results, due to run-off contamination from the asphalt parking lot. However, SCDOHS Sanitarian Feindt provided opinion testimony that the rain had no impact on the soil that was being sampled.

Respondents also assert that SCDOHS laboratory personnel did not know the constituents of asphalt product and, therefore, could not know if their test results indicated asphalt contamination of samples or presence of petroleum contamination. However, this contention assumes possible asphalt contamination. Feindt testified that she observed a little bit of asphalt falling into the excavations, but said specifically that she is certain that no asphalt particles were collected in the sample bottles. She further stated that the rain was not so strong as to dislodge any particles and transport them into the excavations. She saw no soil being washed away by the rain; she saw no erosion; and the excavations were exposed only for a short time, while the actual sampling took place. Respondents' speculative contentions must be rejected in light of the detailed sampling process described in the record, as elaborated upon by the Feindt testimony.

Lastly, some sample test results are stamped "Some surrogate standard values are below acceptable levels". Respondents assert this language indicates that the SCDOHS laboratory failed to recover control elements placed into the samples during the laboratory sample analyses, and therefore the laboratory cannot ensure that the test results are accurate. However, Amendola explained that the stamp means that the surrogate (control element) level was under-reported by the

sample analysis methodology, and therefore the analysis result probably under-reported the presence of those substances which the analysis was intended to identify. In sum, the stamped language on a sample analysis result indicates that the result obtained by the laboratory are an under-representation of the actual contamination level in the sample. This sample analysis indicating presence of petroleum constituents in the soil samples was confirmed by another test performed on these samples by SCDOHS. Total Petroleum analysis also indicated presence of petroleum constituents in the soil samples.

The Allegation of Petroleum Discharge

Respondents deny that any petroleum discharge occurred at the facility. However, since Mt. Hope has been operating the facility for production of hot asphalt for approximately 22 years, and that production process requires use of petroleum products, it is more likely than not that the discharge occurred during Mt. Hope's tenure at the site. This ongoing discharge of petroleum constitutes a continuing violation of NL §173 since at least September 16, 1993 to the present. *See, Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins,* 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dept. 1985) [*under the Navigation Law, no proof is required for a specific wrongful act or omission which directly caused the spill in order to impose liability.*]

The fact that the discharge may have been petroleum-contaminated soil as opposed to liquid petroleum does not alter the conclusion that analysis of the five SCDOHS samples demonstrates a petroleum discharge occurred at some time prior to the date of sample collection, Exhibits 207(a) through (e); *Domermuth, supra.*

However, Staff asserts that the record sustains a conclusion that Respondent Mt. Hope took specific acts causing the discharge because they paved what is referred to in the record as the "parking lot area". This is an area of the facility that had been used by Mt. Hope to store mounds of raw material, possibly concrete and/or asphalt from excavated roadways, and was subsequently paved to create the "parking lot area". The record is not clear as to whether the concrete or asphalt was removed before the parking area was created. Nor is the record clear whether even if Mt. Hope paved over material it had deposited previously, such material was petroleum-contaminated soil or was some other liquid or solid petroleum product.

In any event, in my view of the record, Staff's contention that Respondents took specific intentional or deliberate acts causing the discharge can not be sustained. Staff's contention that Respondents intentionally discharged petroleum, or even that Respondents were aware of a petroleum discharge at the facility, is unsupported in the record and must be rejected. Nonetheless, I find Respondent Mt. Hope liable for the spill, and therefore responsible for further investigation and remediation of the facility.

2. Alleged violation of ECL §17-0501(l) in that the SCDOHS sample results indicate a petroleum discharge at Respondent Mt. Hope's facility.

ECL §17-0501(l) states:

> It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.

Respondent Mt. Hope asserts that to establish a violation under ECL §17-0501(l), the Department must show that (1) there was a discharge of organic or inorganic matter in waters of the state, (2) Respondent Mt. Hope was responsible for the discharge, (3) the discharged petroleum migrated into the groundwater, and (4) that this discharge caused or contributed to a condition in contravention of the standards adopted by the Department pursuant to §17-0301. *See, Peterson Petroleum, Inc., supra, at 9, Max Kent, supra.*

Respondent Mt. Hope further asserts that there was no evidence submitted by Staff of any testing of groundwater which showed a contravention of Departmental water quality standards.

Based upon the SCDOHS soil sample analyses, Staff has shown by a preponderance of the evidence that a discharge occurred at the facility, and Mt. Hope was responsible for that discharge. However, Respondent has correctly identified the elements of a violation of ECL §17-0501(l). Staff has not

established that the discharged petroleum migrated into the groundwater or that the discharge caused or contributed to a condition in contravention of the standards adopted by the Department pursuant to §17-0301. *Peterson Petroleum, Inc., supra, Max Kent, supra.*

3. Alleged violation of Navigation Law §175 and 6 NYCRR §613.8, which requires that any person who causes a discharge immediately notify the Department.

Staff asserts Respondents violated NL §175 and 6 NYCRR §613.8 by failing to report the discharge to the Department.

Initially, Respondent Mt. Hope asserts that 6 NYCRR Part 613, by its very terms, applies only to petroleum storage facilities with a combined storage capacity of over 1,100 gallons and facilities licensed under Article 12 of the Navigation Law. 6 NYCRR §613.1(b). Mt. Hope asserts no proof has been submitted by Staff to demonstrate the facility falls within the applicability of Part 613. Respondent concludes that based upon the allegations in the Complaint, 6 NYCRR §613.8 is irrelevant to the present proceeding because the Mt. Hope facility is not a petroleum storage facility with a combined storage capacity of over 1,100 gallons or a facility licensed under Article 12 of the Navigation Law.

I find that 6 NYCRR Part 613 is not applicable to the instant action, for reasons cited by Respondent Mt. Hope. However, I find that Navigation Law Article 12 is applicable. *See,* NL §§172(8), 173, 172(14), 175 and 181, discussed above. Following is a discussion of the Navigation Law cause of action.

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Staff relies upon Karen Gomez's testimony to show that Respondent Mt. Hope never reported the petroleum discharge to the Department. Further, Staff asserts that once Staff learned of the petroleum discharge through its review of the SCDOHS sample analyses, Karen Gomez prepared a spill report and obtained a spill number from the Department's spill hotline. Staff asserts that Respondents' failure to report the spill to the Department constitutes violation of NL §175, because Respondents were responsible for causing a discharge and failed to notify the Department.

Respondent Mt. Hope asserts there is no credible proof that a discharge of petroleum requiring reporting occurred at the facility. Therefore, Mt. Hope asserts it was under no obligation to report any discharge to the Department. Respondent points out that Gomez was presented with a portion of the SCDOHS soil sample analysis results in or about June, 1994. Further, that although Gomez's June 17, 1994 memorandum to Regional Director Cowen[17] recommended remediation of the facility, Gomez did not file a spill report with the Department's Central Office, Albany, New York, until the end of August, 1994. Respondent Mt. Hope asserts that Gomez reported a spill then, only after receiving specific instructions to do so from the NYSDEC Region 1 Regional Director. In sum, Mt. Hope concludes it never knew that a discharge requiring reporting had occurred, and that in any event, Gomez (and by implication, Staff) did not treat the SCDOHS sample analysis results as a high priority.

Since this cause of action is limited to a request for remedial investigation and remediation only, a determination on the

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17. Exhibit 290

allegation of failure to report a discharge is of collateral importance. Navigation Law §173 prohibits discharge of petroleum. The SCDOHS sample analysis results for the five samples at issue demonstrates presence of petroleum product in the ground at the facility. Therefore, it is reasonable to conclude that a discharge occurred at some time prior to sampling, thereby causing the presence of petroleum product in the soil. Since Respondent Mt. Hope has operated the facility for the production of virgin hot asphalt for more than 22 years, Respondent Mt. Hope is reasonably responsible for that discharge. Pursuant to Navigation Law §181(1), Respondent Mt. Hope is strictly liable for all cleanup and removal costs associated with the petroleum discharge.

However, the record before me does not establish how or when the discharge occurred; or whether the discharge was liquid petroleum, leachate from contaminated soil, burial of contaminated soil or some other discharge of petroleum[18]. Staff asserts that SCDOHS concluded that petroleum-contaminated soil was buried at the facility, and that Respondents buried the contaminated soil. However, the testimony of the SCDOHS witnesses provides no opinion as to what quantity of petroleum product is present at the facility, how widespread the discharge is, or the likelihood of how the levels of petroleum identified in the five samples came to be present in the facility's soil.

Thus, Staff's assertion that Respondents buried petroleum-contaminated soil at the facility, must be rejected. Nonetheless, since a petroleum discharge has been proven, Respondent Mt. Hope should be directed to perform a remedial investigation and remediation of the facility.

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18. Pursuant to NL §172(14), petroleum is defined as oil, or petroleum of any kind and in any form.

Lastly, since Staff has failed to prove how or when the discharge occurred, it would be anomalous to impose any penalty upon Respondents for failure to report the discharge. In any event, the reporting allegation, if it had been proven, would not result in a monetary penalty because Staff seeks no monetary penalty on this cause of action. Instead, the reporting violation would have been another factor to be considered, in the permit aspect of this consolidated action.

D. RESPONDENT FRANK PETROSKY

Staff seeks to impose liability upon Respondent Frank Petrosky in both his individual and corporate capacities. Respondents admit Frank Petrosky was President of Respondent Mt. Hope at all times at issue. However, Respondent Petrosky asserts that Staff failed to establish that Petrosky was individually liable for any violation alleged in Staff's Complaint. Further, Respondent Petrosky asserts that Staff failed to prove he was involved in the day-to-day activities of the facility.

It is well established that a corporate officer may be held criminally liable for violations of statutes enacted to protect the public health, safety and welfare, where that officer had the authority and responsibility to prevent the violation *(United States v. Park,* 95 S.Ct. 1903 (1975); *United States v. Dotterweich,* 65 S.Ct 134 (1943)). The rationale for holding corporate officers criminally responsible is more persuasive where only civil liability is involved *(United States v. Hodges X-Ray, Inc.,* 759 F.2d 557 (CA 6th Cir, 1985)). The record demonstrates that Respondent Frank Petrosky held such a position of authority and responsibility with respect to corporate Respondent, Mt. Hope Asphalt Corp. *(See, Ronald Edgar,*

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Productive Recycling, Inc., and Productive Recycling Corp., Commissioner's Order, June 18, 1993).

With respect to Petrosky's role as day-to-day manager of Mt. Hope, Petrosky regularly held himself out to Staff as the individual to be contacted in matters involving Mt. Hope Asphalt Corp. Petrosky maintained an office at Mt. Hope's offices located at the facility, he was regularly on-site and he regularly met with Department personnel, both at the Department's Regional office and during Staff's site visits to the Mt. Hope facility. In fact, the record shows that Petrosky regularly responded to Staff's concerns, and that Staff contact with Mt. Hope in all matters regarding the facility, was almost exclusively directed to Respondent Petrosky. For example, it was Petrosky that responded to Staff's concerns about dust at the facility by having the road between the offices and the facility paved.

In addition to these indications of Petrosky's role managing the day-to-day activities of the facility, he also certified the Mt. Hope documents stating that the petroleum-contaminated soil indicated therein was recycled and made into road paving materials. Exhibits 194, 195 and 198. Lastly, Respondent Petrosky regularly attended meetings with Department Staff at the Department's Region 1 Offices and the Mt. Hope Asphalt Corp. facility, on behalf of Mt. Hope. In terms of contact between Staff and Mt. Hope, Petrosky was virtually the exclusive representative of Mt. Hope, on matters of daily functioning of the facility and on other matters.

As President and day-to-day manager of Mt. Hope Asphalt Corp., Frank Petrosky was a high managerial agent of Respondent Mt. Hope, and was in a position to prevent the

corporate violations that occurred regarding receipt of contaminated soil from New Jersey sites. Therefore, Respondent Frank Petrosky is individually liable for the violations of the corporation. (*See, U.S. Pollution Abatement Services of Oswego Inc.*, 763 F.2d 133 (1985); *Avory L. Clark v. Pinehill Homes*, 112 A.D.2d 755 (4th Dept. 1985); *In the Matter of Jackson's Marina, Inc., Gordon Jackson, James H. Rambo, Inc. and Thomas Samuels*, (Commissioner's order, November 6, 1991).

RELIEF

I. CIVIL PENALTIES

ECL §71-2703(l) provides for a maximum civil penalty in the amount of Two Thousand Five Hundred ($2,500.00) Dollars for each violation of ECL Article 27, Title 7, or rules or regulations issued pursuant thereto, and an additional penalty of not more than One Thousand ($1,000.00) Dollars for each day during which such violation continues.

ECL §71-1929 provides that any person who violates any of the provisions of, or who fails to perform any duty imposed by Titles 1 through 11 inclusive and Title 19 of ECL Article 17, or regulations promulgated pursuant thereto, shall be liable to a penalty of not to exceed twenty-five thousand dollars per day for each violation. 6 NYCRR Part 613 was promulgated pursuant to ECL §§17-0303(3) and 17-1001, *et seq.* Therefore, the maximum monetary penalty for a violation of failure to report a petroleum spill to the Department, is $25,000 through either the NL as explained below, or through the penalty provision in ECL §17-1929.

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Pursuant to ECL §71-2103(l), except as provided in §71-2113, any person who violates any provision of ECL Article 19 or any code, rule or regulation which was promulgated pursuant thereto, shall be liable in the case of a first violation for a penalty not less that $250.00 nor more than $10,000.00 for said violation, and an additional penalty not to exceed $500.00 dollars for each day during which such violation continues. (ECL §71-2103 [eff. November 1, 1984 through August 3, 1993]; current ECL §71-2103 increases the maximum daily penalty from $500.00 to $10,000.00, and sets both the maximum penalty for subsequent violations and the additional maximum daily penalty for a continuing violation at $15,000.00 [eff. August 4, 1993]).

Navigation Law §181(1) provides that any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in NL Article 12.

NL §192 provides that any person who violates any of the provisions of NL Article 12 or any rule promulgated thereunder or who fails to comply with any duty created by Article 12, shall be liable to a penalty of not more than twenty-five thousand dollars of each offense in a court of competent jurisdiction. If the violation is of a continuing nature each day during which it continues shall constitute an additional, separate and distinct offense.

The Commissioner's Civil Penalty Policy (Enforcement Directives, No. II, issued 6/20/90) states that undertaking any action which requires a Departmental permit, without first obtaining that permit, is always a serious matter, not a mere

technical or paperwork violation, even if the activity is otherwise in compliance. (Civil Penalty Policy, page 8).

Staff has computed a maximum monetary penalty in excess of $14,000,000.00, and seeks a monetary penalty in excess of $1,000,000.00 in its Complaint. In its closing brief, Staff has modified its request for relief, seeking in excess of $1,000,000.00 from each Respondent, $327,000.00 of which is sought to be imposed by joint and several liability upon Respondents.

A. The Charge of Violation of ECL Article 19 and 6 NYCRR Part 201

1. Respondents violated ECL Article 19, 6 NYCRR §201.2(d) and Permit to Construct (EP2, the afterburner), Special Permit Condition #4.B., by Respondents' receipt and/or processing on 36 occasions, of contaminated soil from sites located in the State of New Jersey which did not have a NYSDEC-assigned spill number. Staff has summarized these 36 violations in a chart in their closing brief (Hearing Report Appendix B). Staff has proven 36 of 39 allegations set forth in their Complaint (the three unproven allegations are the sixth, eighth and twelfth occasions alleged in their Complaint; see Appendix A).

For these violations, Staff seeks a maximum monetary penalty of $10,000.00 per occasion, a maximum total penalty of $360,000.00. However, I recommend a substantially reduced penalty level because although Respondents are ultimately liable for these violations, in 35 of the 36 occasions proven, Respondents received material of the kind and quality authorized to be processed at the facility, but for the fact that the material originated in New Jersey, rather than New York. I

find these violations to be *de minimis* with respect to the 35 occasions other than the Ideal Aluminum violation (*i.e.*, Ex. 170). Therefore, I recommend a penalty of $100.00 for each of the 35 violations. With respect to the Ideal Aluminum violation, since that analytical report and signature were falsified, I recommend a maximum penalty of $10,000.00, a total monetary penalty on this cause of action, of $13,500.00.

2. Staff has proven Violation of ECL Article 19, and 6 NYCRR §201.2(d) and Permit to Construct (EP2), Special Permit Conditions (5)(B) and (5)(E), by failure to submit to the Department on a quarterly basis, logs which contained entries for 36 of the 39 instances described in the first alleged violation. The Second Ruling (dated July 12, 1994) limited Staff's cause of action on to reporting violations alleged to have occurred after May 8, 1992 (the most recent time period addressed by a January 13, 1993 Consent Order).

Staff seeks a maximum monetary penalty of $10,000.00 per occasion of unreported receipt, a maximum total penalty of $360,000.00; or, in the alternative, pursuant to the limiting Second Ruling, Staff seeks the maximum penalty for ten occasions of non-reporting that occurred on or, after May 8, 1992, a maximum total penalty of $100,000.00.

I adopt Staff's alternative penalty analysis on this cause of action, because as indicated in the Second Ruling, the regulatory and statutory authority cited in the January 14, 1993 Consent order reporting violations (Consent Order, #1-5074-92-06) and in Complaint paragraph B7 are the same. Therefore, res judicata bars relitigation of the reporting cause of action alleged in Complaint paragraph B7, for the same time period addressed in the Consent Order. Accordingly, I limited Staff's cause of

action in Complaint paragraph B7, to address only those reporting violations alleged to have occurred after May 8, 1992 (*i.e.,* the most recent time period addressed by the Consent Order).

However, in assessing this penalty, I find that Respondents violated the reporting requirement for three quarterly reports (Exhibits 212, A, B and C), and that the pattern and number of reporting omissions in the quarterly reports are aggravating factors in penalty assessment. Since Respondents repeatedly omitted reporting of New Jersey sites in the three quarterly reports, Respondents Mt. Hope and Petrosky should be held jointly and severally liable for the maximum penalty for the three occasions of incomplete quarterly reports submitted on or after May 8, 1992, a total penalty of $30,000.00 on this cause of action.

B. The Charge of Violation of ECL Article 27 and 6 NYCRR Part 360

Staff alleges that Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, by operating a solid waste management facility ("SWMF") without a permit, 'by receipt and/or processing and/or disposal of contaminated soil on the above referenced 36 occasions in a manner not consistent with the Beneficial Use Determination ("BUD") issued to Respondent Mt. Hope on August 9, 1991; or alternatively, Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, because the BUD did not contemplate receipt and/or processing and/or disposal of any material that Respondents received from August 7, 1991 to September 15, 1993.

ECL §71-2703(1) provides for a maximum civil penalty in the amount of Two Thousand Five Hundred ($2,500.00) Dollars

for each violation of ECL Article 27, Title 7, or rules or regulations issued pursuant thereto, and an additional penalty of not more than one Thousand ($1,000.00) Dollars for each day during which such violation continues.

I find that Respondents' receipt, processing or disposal of petroleum-contaminated soil from the State of New Jersey on 36 occasions were activities outside the scope of authority granted by the BUD. These activities are within the Department's solid waste regulatory program. Since the activities were outside the authority of the Beneficial Use Determination that Respondents obtained, a solid waste management facility permit was required for these activities, a permit which Respondents did not obtain. Therefore, Respondents violated ECL §27-0707 and 6 NYCRR 360-1.7, on 36 occasions by receipt of New Jersey petroleum-contaminated soil absent a Solid Waste Management Facility Permit. Staff seeks a penalty of $2,500.00 for receipt of the first New Jersey soil, on November, 17, 1991 and an additional penalty of $1,000.00 per day for an additional 290 days (through September 17, 1992), a penalty of $292,00.00.

As discussed above, the 36 occasions of receipt of materials from New Jersey sites were, in all but one instance, of the kind and quality authorized to be processed at the facility, but for the fact that it originated in New Jersey. I recommend a penalty of $1000.00 for the initial violation and 100.00 per day for the additional 290 days, a total monetary penalty of $29,900.00 on this cause of action.

Therefore, the total monetary penalty recommended on the enforcement aspect of the consolidated action, is $73,400.00.

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II. REMEDIATION

Violation of Navigation Law Article 12, ECL Article 17 and 6 NYCRR Parts 360 and 613

Staff asserts that Respondents violated Navigation Law §173 and ECL §17-0501(1) by causing a discharge of petroleum at the Mt. Hope facility on or before September 16, 1993, a continuing violation. Staff does not seek any monetary penalty for this component of its Complaint, but does seek an order requiring further investigation and remediation. Staff asserts that Respondents also violated ECL §17-0501(l) in that the SCDOHS sample results indicate a petroleum discharge at Respondent Mt. Hope's facility.

Navigation Law §175 and 6 NYCRR §613.8 require that any person who causes a discharge immediately notify the Department. Staff asserts Respondents violated NL §175 and 6 NYCRR §613.8 by failing to report the discharge to the Department. Staff witness Gomez testified that Mt. Hope never reported the discharge to the Department. (T. 2191). Once Staff learned of the discharge, Gomez prepared a "spill report" and obtained a "spill number" from the Department's "spill hotline". (T. 2179-2186). Staff asserts that Respondents' failure to report the discharge to the Department constitutes violations of NL §175 and 6 NYCRR §613.8.

6 NYCRR §360-1.7(a)(1)(ii) (effective as of October 9, 1993) provides, in pertinent part that: "no person shall construct or operate a solid waste management facility, or any phase of it, in accordance with a valid permit issued pursuant to this Part . . .". The regulations in existence before October 9, 1993 provide essentially the same substantive requirement, with some minor differences in wording.

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A solid waste management facility is defined as "any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to: storage areas or facilities; . . . disposal facilities . . .". This definition was not modified by the October 9, 1993 revisions to Part 360.

Staff asserts that Respondents disposed of petroleum-contaminated soil through burial at the facility and that Respondents also continue to store petroleum-contaminated soil at the facility, in violation of 6 NYCRR §360-1.7 (a) (1) (ii) [operation of a solid waste management facility without a permit] and 6 NYCRR §360-1.5(a) [illegal disposal of solid waste]. As with the other allegations contained in section D of the Second Amended Complaint, Staff seeks no penalties with regard to these alleged violations of Part 360, but rather, seeks an order requiring Respondents to remediate the upper "parking lot area" and to remove stored petroleum-contaminated soil from the west side of the stockpile area.

Respondents assert that Staff failed to prove remediation is necessary. Respondents further assert that any soil stored on the contaminated-soil pad, remains there lawfully.

The parties stipulated that since September 15, 1993, Respondents have continuously maintained approximately 2,000 cubic yards of stockpiled petroleum-contaminated soil on a storage pad at the facility. September 15, 1993 is the date that authorization to process petroleum-contaminated soil at this site expired. That authorization had been granted through Consent Order No.1-5074-92-06, which was modified on March 23, 1993; July 30, 1993; and August 27, 1993. The final modification extended the temporary authority to operate until

September 15, 1993. No further extension was granted. Respondents were advised that they could no longer use petroleum-contaminated soil for the production of asphalt (*See,* letter from Regional Director Ray Cowen to Barry S. Cohen, Esq., dated September 16, 1993 [Exhibit 310]). Therefore Respondents' argument that storage of soil remaining at the facility is authorized by the extending provisions of SAPA, must be rejected.

Staff asserts that Mt. Hope's continued stockpiling of petroleum-contaminated soil after expiration of its authority to operate under the Consent Order, constitutes an ongoing violation 6 NYCRR §360-1.7(a)(1)(i), in that Respondents have been operating a solid waste management facility without a permit.

Based upon SCDOHS analytical soil sample results, Staff seeks an order requiring Respondents to further investigate and remediate the petroleum contaminated areas at the facility[19]. Staff bases its request for remediation upon its review of the sample results, consistent with guidance contained in the Department's Spill Technology And Remediation Series ("STARS"), Memo #1 — Petroleum-contaminated soil Guidance Policy[20]. Staff also seeks an order requiring Respondents to remove remaining stored material to an authorized treatment, storage or disposal facility.

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19. Those areas have been identified through SCDHS analysis of samples 6MF, 7MF, 18MF, 20MF and 21MF.

20. The STARS Memo #1 was issued in August, 1992 by the Department's Division of Construction Management, Bureau of Spill Prevention and Response, in conjunction with the Department's Division of Solid Waste.

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STARS Memo #1 provides:

> If the calculated maximum possible contaminant concentration in the extract liquid is greater than the TCLP Extraction Guidance Value, then no conclusion can be drawn and groundwater quality protection must be confirmed by actually performing the TCLP extraction for that contaminant. (STARS p. 6).

Staff witness Gomez compared the SCDOHS analysis results to the TCLP Alternative Guidance Values in STARS Memo #1. Gomez created a chart which identifies samples indicating presence of petroleum constituents, and indicates the extent to which guidance values are exceeded[21]. She attached a copy of this chart to her June 17, 1994 memorandum to Regional Director Ray Cowen. She also provided a copy of this chart to Respondents by enclosure with her September 6, 1994 letter to Respondents.

STARS Memo #1 was written as a guidance document to assist Regional Spill Investigators, among others, "in determining whether soils have been contaminated to levels which require investigation and remediation" (STARS Memo #1, page 1). In conformance with this guidance, Staff requests that Respondents be ordered to further investigate and remediate the petroleum contamination at the facility.

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21. The analysis results that Ms. Gomez refers to in this chart were calculated using external calibration standards. *See* Footnote 30 which shows that the contamination levels were found to be substantially higher when the results were recalculated using internal calibration standards. Also, the results of 7MF, after recalculation because of mathematical error, are still higher than the STARS Memo guidance value (*see* Exhibit 209, page 4).

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Respondent Mt. Hope asserts that Gomez conceded in her memo of June 17, 1994 that, (i) the SCDOHS samples would not likely test hazardous by the TCLP method, and (ii) groundwater has not been impacted, based upon samples taken from monitoring wells hydraulically downgradient. Gomez also conceded at the Hearing that none of the Guidance Values concerning human health, or fish and wildlife under STARS were exceeded by the SCDOHS results.

Further, Respondent Mt. Hope asserts its expert witness, Dr. Olin Braids, testified that no definitive tests had been conducted to determine that there was any potential hazard to groundwater by contamination at the site and that there was no groundwater contamination at the facility based upon monitoring analysis. Mt. Hope concludes that Braids' testimony was not controverted by any witness presented by Staff.

However, the evidence consisting of sampling of the facility performed by the Suffolk County District Attorney's office and the Suffolk County Department of Health Services, shows that a petroleum discharge occurred at the facility, prior to the sample collection date. Staff asserts this evidence shows that Respondents buried and thereby discarded additional petroleum-contaminated soil in the south-eastern area of the upper parking lot. However, I reject this assertion. (*See, p. 49, supra*). Since the facility has been operated by Mt. Hope for more than 22 years, it is more likely than not, that Mt. Hope is responsible for the discharge.

The soil sample evidence indicates that a discharge occurred. However, testimony did not identify the extent of the discharge. Staff implicitly acknowledges it does not know the extent of the discharge, in that it seeks an order requiring

further site investigation. Further, the record before me is not adequate to establish that the discharge occurred by Mt. Hope's deliberate burial of petroleum-contaminated soil. Petroleum constituents have been used at this facility for the past 22 years for production of hot asphalt. It is possible that the discharge occurred inadvertently at some time in the past.

Accordingly, I reject Staff's assertion that these facts and circumstances constitute a basis for remediation as an ongoing violation of 6 NYCRR §360-1.7(a)(1)(i) in that Respondents are operating a solid waste management facility without a permit. Nonetheless, pursuant to NL §181(l), Respondents are responsible for remediation of the discharge.

III. PERMIT REVOCATION AND DENIAL

In the permit aspect of this consolidated action, Staff seeks to have Respondent Mt. Hope's Departmental BUD and permit revoked and its application for an air Certificate to Operate EP4, denied. The basis of Staff's revocation and denial action is its assessment that Respondent Mt. Hope is unsuitable and unfit to hold environmental permits or engage in activities within the Department's purview. Each determination of suitability and fitness is necessarily specific to the facts and circumstances of the particular permittee/applicant.

Staff asserts two bases for a determination that Mt. Hope is unsuitable and unfit to hold Departmental permits: (1) Complaint violations proven in this consolidated action; (2) Respondent Mt. Hope's history of violations, including two Consent Orders, executed in 1991.

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Staff has shown only one instance of falsified Impact Environmental documents. For that violation, it is not possible to determine what the characteristics of the material were, because the report was falsified. However, based upon that one falsified report, Staff seeks a determination that it is impossible to determine the characteristics of all 36 New Jersey occasions proven. Staff asserts that we can not know what materials were received and processed at the facility because all reports were falsified. However, Staff has shown that only one report was falsified. Therefore, Staff's theory of liability must be rejected for the remaining 35 incidents. Regarding those incidents, the reports indicate the material was non-hazardous petroleum-contaminated soil; Staff has stipulated as much.

The Permit to Construct EP2 requires that all deliveries of contaminated soil are to be reported to the Department. Respondents admit that they maintained log books at the facility containing all the materials accepted into the facility, including the New Jersey material. Therefore, Respondent Mt. Hope's submission of three quarterly reports to the Department (Exhibits 212 A, 212 B, and 212 C) is evidence of Respondent's intent to purposefully deceive Department Staff into believing that Respondents were receiving materials only from the State of New York, in compliance with the permit. In light of Respondent Petrosky's role as President and day-to-day manager of the facility, it is reasonable that this intent is imputed to him as well.

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Record of Compliance

The Department's Record of Compliance Enforcement Guidance Memorandum ("ROC-EGM"; revised February, 1993) states that factors to be considered in determining an applicant's or permittee's suitability and fitness to engage in regulated activities include:

1) determinations that a permittee or applicant has been found to have violated provisions of the ECL and/or conditions or terms under a permit issued by the Department;

2) whether a pattern of non-compliance has been established by the permittee or applicant;

3) whether the applicant or permittee has made materially false or inaccurate statements in the conduct of its permitted activity; and

4) whether the permittee has exceeded the scope of a project as described in any permit. (ROC-EGM, at 5).

Violations proven by Staff against Respondents in this consolidated action are appropriate factors for consideration in the permit revocation/denial determination[22]. (ROC-EGM at 5). Therefore, Staff has proven that Respondents violated provisions of the ECL, and their August 9, 1991 permit to construct an afterburner, and acted outside the scope of authority of the BUD.

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22. The record reflects a criminal action pending against Respondents, pending with the Office of the Suffolk County District Attorney. That pending criminal matter is not considered as a factor in this record of compliance analysis.

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Staff has also shown that Respondents have engaged in a pattern of non-compliance. Respondents have not complied with provisions of Consent Order R1-5074 (executed January 14, 1993), Consent Order R1-4570 (executed May 28, 1991) and Consent Order R2-3559 (executed July 18, 1991).

Further, Respondents failed to comply with financial auditing requirements of Consent Order R1-5074 and failed to attempt to get a certificate to operate their afterburner by the July 31, 1993 milestone date in Consent Order R1-5074. Consent Order R1-5074, Schedule A, Sections IV and V, required Respondent Mt. Hope to submit an affidavit from a CPA certifying that it performed an investigation of Respondent's corporate records regarding Thomas Accardi. Instead, by letter dated June 7, 1993, Respondent Petrosky submitted a letter from Marks, Shron & Company, Mt. Hope's accountants, that stated generally that it had never come to their attention that Thomas Accardi was an officer, director or shareholder of Respondent Mt. Hope. This letter further stated that Marks, Shron & Company's determination was based upon a review of 1992 payroll tax returns. Not only was no affidavit provided, but the letter was not even signed by any particular individual.

The Marks, Shron & Company letter provided by Respondents failed to satisfy the requirements of Sections IV and V of Schedule A of Consent Order R1-5074. Staff's response to the Marks, Shron & Company's letter stated that it was inadequate because no affidavit was provided and no independent investigation was conducted. Further, a review of the 1992 payroll tax returns did not constitute a sufficient investigation under the terms of the Schedule in the Order. Finally, a review of all cash disbursements was required,

whereas Marks, Shron & Company reviewed only the 1992 professional fee account and general ledger.

Concerning Respondents' failure to get a certificate to operate by the Consent Order milestone date, Respondents did not respond to a January 4, 1993 request by the Department for further information and clarification of the application for a certificate to operate the afterburner until July 27, 1993. The response was received only four days before the July 31, 1993 milestone date established in the Order on Consent. Staff reminded Respondents that their application for a certificate to operate was incomplete, by Carmintzos' February 25, 1993 letter to Respondent Petrosky. Robert Capp, Region 1 Air Pollution Control Engineer, also reminded Respondents that their application was incomplete in his letter of July 28, 1993 to Respondent Petrosky.

Regarding the third enumerated factor, Respondents submitted false and incomplete information to Staff regarding spill numbers for 36 New Jersey incidents and falsification of Exhibit 170.

Finally, regarding the fourth enumerated factor, Respondents exceeded the scope of authority of the BUD, thereby operating a SWMF without a permit. Although the BUD is not a permit it is a grant of Departmental authority relating to environmental activities. Accordingly, this is properly considered under the cited ROCEGM provision.

Respondent Frank Petrosky

Staff has shown that Respondent Petrosky was day-to-day manager of Mt. Hope during the time period at issue. With

respect to the falsified spill numbers appearing in Mt. Hope's log books, falsified Impact Environmental report and falsified Parish signature, Staff has established that it is more likely than not that Respondent Petrosky, individually, was in a position to know of, and prevent, those falsifications.

The omission of New Jersey sites from three quarterly reports and the falsification of seven digit spill numbers, can not be attributed to mere innocent coincidence, as Respondents assert. The record shows that Accardi (and therefore, Disposal Technologies) at least, knew that Respondent Mt. Hope lacked authority to receive and process materials originating outside the State of New York. In 1991, Accardi and Petrosky worked closely together in pursuing and obtaining the Mt. Hope Permit to Construct EP2 (and consequently, the BUD). Therefore, it is more likely than not, that Petrosky also understood that Mt. Hope lacked authority to receive material from outside the State of New York.

The falsified spill numbers first appear on documents produced under the Disposal Technologies letterhead. Although not proven to be the case, the spill numbers from those documents may have been simply copied into the Mt. Hope log by unwitting Mt. Hope employees. Similarly, the falsified report and signature appear on a letter addressed to Disposal Technologies. Nonetheless, the record does reasonably establish that Petrosky was aware of Mt. Hope's receipt of materials from New Jersey locations.

Based upon the fact that the New Jersey sites were omitted from the quarterly reports that Respondent Mt. Hope was required to file with Staff and that falsified spill numbers were created, at least Accardi/Disposal Technologies were aware that

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Respondent Mt. Hope lacked authority to receive and process materials originating outside the State of New York. Even if only Accardi/Disposal Technologies were aware of this lack of authority, this knowledge is imputed to Respondent Mt. Hope under the agency relationship, even if not actually known by Respondent Mt. Hope. In light of Respondent Petrosky's pivotal role in the operation of the Mt. Hope facility, both as day-to-day manager and as a high managerial agent of Respondent Mt. Hope, it is more likely than not, that Respondent Petrosky did know of the falsified spill numbers in the Mt. Hope logbooks.

However, as to falsification of the Ideal Aluminum analytical report and Parish signature, I conclude that the record does not sustain a finding of personal liability against Respondent Petrosky. It is equally reasonable that Accardi/ Disposal Technologies may have performed these acts absent Petrosky's individual knowledge (and absent Mt. Hope's knowledge). Nothing in the record supports a finding that Petrosky knew of these acts.

Since Staff bears the burden of proof, Respondents are not required to prove by a preponderance of the evidence that Accardi/Disposal Technologies were in fact responsible for the Ideal Aluminum falsifications (nor have Respondents done so). Staff has not proven that Respondent Petrosky had personal knowledge of the falsified report and signature or that he was in a position to prevent those falsifications. This affects Petrosky's liability for violations alleged in the Complaint, in that I consider the Ideal Aluminum falsifications an escalating factor in my penalty analysis for that violation of Special Permit Condition (4)(B). Therefore, Petrosky, personally, should not be held jointly liable for the $10,000 penalty assessed against

Respondent Mt. Hope on that charge. Further, this factor should not be considered against Respondent Petrosky in assessing Petrosky's record of compliance with respect to any future application that he may seek.

Staff's intent to revoke Respondent Mt. Hope's permit and deny its permit application should be granted. In effect, this renders the Beneficial Use Determination void, because the BUD was conditioned upon Respondents' operation of the Calverton facility.

RECOMMENDATIONS

Upon consideration of the foregoing, and upon a complete review of the entire record of this consolidated action, it is recommended that:

1. The charges against Respondents Mt. Hope and Petrosky, of violating Special Conditions (4)(B) and (5)(B) of Respondent Mt. Hope's Permit to Construct EP2; ECL §27-0707 and 6 NYCRR 360-1.7; Navigation Law §173 and Navigation Law §175 should be sustained.

2. A monetary penalty in the amount of Sixty Three Thousand, Four Hundred ($63,400.00) Dollars, should be assessed against Respondent Mt. Hope and Respondent Frank Petrosky, individually and in his capacity as an officer of Respondent Mt. Hope Asphalt Corp., jointly and severally. An additional penalty of Ten Thousand ($10,000.00) Dollars should be assessed against Respondent Mt. Hope. Monetary penalties should be due and payable within thirty days of service of a conformed copy of the Commissioner's order upon Respondents.

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3. The charges against Respondents Mt. Hope and Petrosky, of violating Special Permit Condition (5)(E) (Permit to Construct EP2), ECL §17-05011 6 NYCRR 613.8 should be dismissed.

4. Respondents should be ordered to cease importing any additional materials to the site, and ordered to perform remedial investigation, remediation and closure at the site pursuant to NL §173, ECL Article 27 and 6 NYCRR Part 360, in accordance with the recommendations of, and subject to approval of , Department Staff..

5. Respondent Mt. Hope's Permit to Construct EP4 (#1-4722-01052/00004-0) should be revoked and and its permit application for a Certificate to Operate EP2 (#1-4722-01052/ 000030) should be denied. The Beneficial Use Determination can not be revoked, since it is a determination, not a permit. However, in effect, revocation and denial of Respondent Mt. Hope's permit and permit application render the Beneficial Use Determination void, because the BUD was conditioned upon Respondents' operation of the Calverton facility.

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APPENDIX A

NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
1	N.J. POWER & LIGHT NEWARK, NJ	682.92 TONS	ON OR ABOUT 11/13/91
2	MARTANT REALTY LODI, NJ	69.76 TONS	ON OR ABOUT 11/18/91
3	CASTLE EXCAVATING ROCKLEIGH, NJ	523.3 TONS	ON OR ABOUT 11/04/91- 12/03/91
4	CAROLACE COMPANY RICHFIELD, NJ	305.60 TONS	ON OR ABOUT 12/06/91
5	MASTER HEAT TREATING SPRINGFIELD, NJ	18.36 TONS	ON OR ABOUT 12/17/91
6	DUX PAINT & CHEMICAL, INC. 18 MILL STREET LODI, NJ	60 TONS	ON OR 12/91
7	NEW JERSEY TRANSIT MEADOWLAND BUS FACILITY 2600 PENN HORN AVENUE NORTH BERGEN, NJ	1000 TONS	ON OR ABOUT 12/91 THROUGH 01/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
8	LAKELAND EXPRESS WHARTON, NJ	986 TONS	ON OR ABOUT 12/03/91
9	PRESIDENT CONTAINER, INC. 200 WEST COMMERCIAL AVENUE MOONACHIE, NJ	305.40 TONS	ON OR ABOUT 12/18/91
10	FRANK CURCIO 416 LANZA AVENUE SADDLE BROOK, NJ	66.15 TONS	ON OR ABOUT 12/24/91
11	IDEAL ALUMINUM 100 W. SEVENTH ST. BAYONNE, NJ	116.71 TONS	ON OR ABOUT 12/24/91
12	PARK & RIDE NEW JERSEY RAIL OPERATIONS PATTERSON PARK ROAD SECAUCUS, NJ	509.26 TONS	ON OR ABOUT 01/03/92
13	EDWARD EHRBAR NICHOLS STREET SOUTH PLAINFIELD, NJ	244 TONS	ON OR ABOUT 01/07/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
14	DUX PAINT 18 MILL STREET LODI, NJ	78.28 TONS	ON OR ABOUT 01/07/92
15	MERCEDES BENZ ONE GLENVIEW ROAD MONTVALE, NJ	252.76 TONS	ON OR ABOUT 01/20/92
16	U.S. POSTAL SERVICES KILMER RD. & TRUMAN DR. EDISON, NJ	313.70 TONS	ON OR ABOUT 01/25/92
17	QUEST INTERNATIONAL Rt.10 W. & RIDGEDALE AVE. EAST HANOVER, NJ	248.68 TONS	ON OR ABOUT 01/27/92- 01/28/92
18	MELL MASTER ONYZ 2025 LINDEN AVENUE LINDEN, NJ	76.41 TONS	ON OR ABOUT 01/28/92
19	NATIONAL TOOL & MFG. CO. 100-124 NORTH 12TH STREET KENNILWORTH, NJ	65.65 TONS	ON OR ABOUT 01/30/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
20	PUBLIC SCHOOL SCHOOL STREET WASHINGTON TOWNSHIP, NJ	37.01 TONS	ON OR ABOUT 02/18/92
21	BRADFORD UTILITIES 517 LYONS AVENUE HACKENSACK, NJ	311.87 TONS	ON OR ABOUT 02/19/92
22	MULTI-PAK SALES CORP. 400 RAILROAD AVENUE HACKENSACK, NJ	133.98 TONS	ON OR ABOUT 02/20/92
23	LAKELAND EXPRESS CO. ROUTE 15 WHEATON, NJ	1,200 TONS	ON OR ABOUT 03/02/92 - 03/16/92
24	BOROUGH OF HARRINGTON PARK 6611 SCHRAVLENRUD ROAD HARRINGTON PARK, NJ	110.01 TONS	ON OR ABOUT 03/04/92
25	TOWN OF BERKELEY PINEWALD-KESWICK ROAD BERKELEY, NJ	83.65 TONS	ON OR ABOUT 03/05/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
26	L & M PROPERTIES 15 BELLVILLE AVENUE BLOOMFIELD, NJ	42.51 TONS	ON OR ABOUT 03/06/92
27	AIR CRUISERS ROUTE 34 NORTH TINTON FALLS, NJ	24.81 TONS	ON OR ABOUT 03/10/92
28	U.S. WELDING 481 HOBOKEN AVENUE JERSEY CITY, NJ	12.92 TONS	ON OR ABOUT 03/16/92
29	STAPLING MACHINES CO. ROCKAWAY, NJ	218.34 TONS	ON OR ABOUT 03/26/92
30	GETTY PETROLEUM 1028 AVENUE C BAYONNE, NJ	40.57 TONS	ON OR ABOUT 05/08/92
31	GETTY PETROLEUM RTE. 46/88 EAST MC FARLAND DOVER, NJ	56.56 TONS	ON OR ABOUT 05/12/92
32	GETTY PETROLEUM 1384 MORRIS AVENUE UNION, NJ	73.55 TONS	ON OR ABOUT 05/13/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
33	GETTY PETROLEUM 58 GREENBROOK ROAD NORTH PLAINFIELD, NJ	25.72 TONS	ON OR ABOUT 05/15/92
34	GETTY PETROLEUM 310 BELLVILLE AVENUE BELLVILLE, NJ	88.35 TONS	ON OR ABOUT 05/19/92
35	SANDOZ PHARMACEUTICALS ROUTE 10 EAST HANOVER, NJ	1.605.4 TONS	ON OR ABOUT 06/11/92
36	GETTY PETROLEUM MIDLAND AVENUE GARFIELD, NJ	38.25 TONS	ON OR ABOUT 06/15/92
37	FABER BROTHERS CONCRETE 240 ROUTE 17 NORTH PARAMUS, NJ	561.37 TONS	ON OR ABOUT 08/28/92
38	GETTY PETROLEUM 2 WEST ST./ GEORGE AVE. LINDEN, NJ	45.63 TONS	ON OR ABOUT 08/28/92

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NO.	GENERATOR	APPROXIMATE TONNAGE	DATES
39	LENAL PROPERTIES JERSEY CITY, NJ	4122.26 TONS	ON OR ABOUT 09/17/92

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APPENDIX B

Exhibit	Page	Line Generator	Amount	Exhibit #	Appendix A Generator No.
84 2	6	"Atrium"	415.18	165	3
84 2	33	"Atrium"	39.70	165	3
84 2	17	"NJ Power"	171.87	163	1
84 2	18	"NJ Power"	313.72	163	1
84 2	22	"Lodi, NJ"	14.87	164	2
84 2	36	"Carolace"	206.99	166	4
84 2		TOTAL =	1162.33		

Exhibit	Page	Line Generator	Amount	Exhibit #	Appendix A Generator No.
84 3	4	"Carolace"	54.39	166	4
84 3	9	"Spring Field"	18.96	167	5
84 3	10	"Pres. Container"	257.68	168	9
84 3	15	"Frank Curcio"	66.15	169	10
84 3	16	"Ideal Aluminum"	116.71	170	11
84 3		TOTAL =	513.89		

Exhibit		Page	Line Generator	Amount	Exhibit #	Appendix A Generator No.
84	4	3	"Dux Paint"	78.28	173	14
84	4	5	"Ed Ehrbar"	244.05	172	13
84	4	12	"Mercedes Benz"	201.02	174	15
84	4	13	"U.S. Postal"	313.17	175	16
84	4	18	"Apachi Products"	76.41	177	18
84	4	19	"Quest International"	212.73	176	17
84	4	26	"NJ Railroad"	449.01	171	7
84	4	29	"NJ Railroad"	126.49	171	7
84	4	34	"Richard Manuf."	311.87	180	21
84	4	37	"Public Schools"	37.01	179	20
84	4	41	"Multi-Pak Sales"	133.98	181	22
84	4		TOTAL =	2184.02		
84	5	13	"S&M"	65.65	178	19
84	5		TOTAL =65.65			

TOTAL FOR EXHIBIT 84 = 3,925.89 tons

Exhibit	Page	Line Generator	Amount	Exhibit #	Appendix A Generator No.
86 2	14	"Getty Station,	31.17	189	30
86 2	26	Bayonne, NJ"	940.00	189	30
86 3	6	"Getty, Union"	73.55	191	32
86 3	10	"Getty, N. Plainfield"	25.72	192	33
86 3	26	"Getty Belleville"	88.35	193	34
86 3	30	"Getty, Dover"	56.56	190	31
86 5	9	"Sandoz Pharm."	1605.39	194	35
86 5	17	"Getty, Garfield"	38.25	195	36
86 5	25	"Faber Bros."	439.73	196	37
86 15	2	"Getty, Linden"	39.92	197	38
86 17	13	"Faber Bros."	49.87	196	37
86 17	25	"Lenal Pronerties"	245.83	198	39
86, Entire Exhibit		TOTAL =	3,634.34 tons		

Exhibit	Page	Line Generator	Amount	Exhibit #	Appendix A Generator No.
182		"Lakeland Express"		1055	23
183		"Borough of Harrington Park"		110	24
184		"Town of Berkeley"		83	25
185		"L & M Properties"		42.51	26
186		"Air Cruisers"		24.81	27
187		"U.S. Welding"		12.92	28
188		"Stapling Machines"		220.00	29

Total New Jersey Soil = 9,108.47 tons

APPENDIX D — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS DATED JULY 9, 1998

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth *day of* July *1998*

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 632

In the Matter of Mt. Hope Asphalt Corp., a/k/a Mount Hope Asphalt Corp., et al., &c. of the Estate of Frank Petrosky,

Appellants,

v.

Michael Zagata, &c., et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

(2)

No. 98-595

FILED

NOV 6 - 1998

CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term 1998

MT.HOPE ASPHALT CORP., a/k/a MOUNT HOPE ASPHALT CORP., and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

-v.-

MICHAEL ZAGATA, Commissioner of the New York State Department of Environmental Conservation and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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181 Delaware Street, Walton, NY 13856—800-252-7181
(4875 – 1998)
Printed on Recycled Paper

13 pp

QUESTION PRESENTED

Whether certiorari should be granted to examine petitioners' claims that the State's issuance of a temporary operating license for asphalt production using contaminated soil from certain New York oil spills violated the Commerce and Equal Protection Clauses, where: (1) petitioners voluntarily proposed such terms to address the regulators' environmental concerns over the quality of its production process and to obtain a temporary operating permit; (2) the State does not impose such source restrictions on license applicants by statute, regulation, or policy; (3) petitioners' permanent license application was ultimately denied on other grounds, including falsification of records and use of undocumented contaminated soil; and (4) petitioners' constitutional challenge to the terms of the temporary license was first raised four years after its issuance and following its expiration.

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No. 98-595

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MT.HOPE ASPHALT CORP., a/k/a MOUNT HOPE ASPHALT CORP., and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

-v.-

MICHAEL ZAGATA, Commissioner of the New York State Department of Environmental Conservation and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Respondents adopt the statement of opinions below set forth in the petition for a writ of certiorari (Pet. 1).[1]

JURISDICTION

Respondents adopt the statement of jurisdiction set forth in the petition for a writ certiorari (Pet. 1).

Counterstatement of the Case

A. Issuance of a Temporary Air Emissions Permit and the Denial of Permanent Operating Permit

In August 1990, petitioner Mt. Hope Asphalt Corp., a manufacturer of asphalt, sought authorization from respondent New York State Department of Environmental Conservation ("NYSDEC") to utilize petroleum contaminated soil ("PCS") as an aggregate to produce asphalt at its facility in Calverton, New York (AT1379, 1485). PCS is soil contaminated with virgin petroleum and no other hazardous substances, typically the result of accidental spills from fuel trucks or leakage at gasoline stations. Previously, Mt. Hope's production process, and all other asphalt production permitted in New York State, employed virgin petroleum and clean soil.

Petitioners' proposal raised a number of significant public health and environmental concerns: it is quite difficult to

---

[1] Numbers in parentheses preceded by "Pet." refer to pages in the petition for a writ of certiorari in No. 98-595. Numbers in parentheses preceded by "A" and "AT" refer respectively to pages in Appellants' Appendix and the Administrative Transcript submitted to the Appellate Division.

distinguish PCS from soils contaminated with waste oil and other hazardous substances; heating soil contaminated with hazardous substances during the production of asphalt could release harmful products into the ambient air; storage of such contaminated soil at the Mt. Hope facility could threaten the underlying aquifer system, a sole source of drinking water; without proper controls, the proposed operation could become a means for the illegal disposal of hazardous wastes.

Aware of the environmental concerns and desirous of addressing them in an economically feasible manner, Mt. Hope proposed that it employ only PCS removed from certain spill sites within New York State, assigned a NYSDEC Spill Number and made the subject of a spill report. By this means, NYSDEC could more easily assure that the PCS was contaminated only with virgin petroleum and no other contaminants (AT104-105, AT1525-1527, 1550, A240). Characterizing this restriction as a "self-imposed condition," Mt. Hope inserted it into its permit application to NYSDEC (A243, "Overview").

In August 1991, NYSDEC issued a one-year interim air permit, including the PCS limitation, allowing Mt. Hope to test the manufacturing process including its pollution control technology. As part of its one year interim permit, Mt. Hope was required to maintain and submit quarterly a log of all PCS deliveries received at the facility (A317-331).

In June 1992, Mt. Hope requested both a one-month extension of its permit and a permit modification that would allow it to utilize PCS from New Jersey during the one-month period (A335, AT1455). NYSDEC granted the extension, but because Mt. Hope proposed no means by which NYSDEC could confirm that the New Jersey PCS was contaminated solely by virgin petroleum and not by other hazardous substances, the agency did not modify the permit (A338). Mt. Hope did not object to or otherwise challenge this determination.

In January 1993, NYSDEC issued an administrative consent order allowing Mt. Hope to continue its operations on a temporary basis pending consideration of its application for a permanent operating permit. (A156-170).

Thereafter, NYSDEC became award that Mt. Hope maintained false logs, submitted false reports, fabricated NYSDEC spill numbers, and utilized PCS unauthorized under its temporary operating permit on thirty-six occasions between November 1991 and September 1992. On September 15, 1993, NYSDEC denied Mt. Hope's application for a permanent operating permit, withdrew Mt. Hope's temporary operating authority, and, shortly thereafter, sought civil penalties for this malfeasance.

Following an eleven-day administrative hearing and the issuance of a sixty-three page hearing report, the Commissioner of NYSDEC accepted an administrative law judge's recommendations and determined, *inter alia*, that Mt. Hope: (1) received and processed 36 shipments of contaminated soil from sites in New Jersey totaling some eighty-eight thousand tons; (2) falsified records by inserting in its Log Book fabricated NYSDEC Spill Numbers for each of those shipments; and (3) submitted a falsified laboratory report with respect to the contaminates in the PCS used at its facility. Based on these and other findings, the Commissioner determined that Mt. Hope and its President Frank Petrosky were "unsuitable and unfit" to hold NYSDEC permits, denied their permit application for a certificate to operate, and assessed $73,400 in civil penalties against Mt. Hope.

B. The Proceeding and Action in State Court

On November 2, 1995, petitioners commenced a proceeding and action before New York State Supreme Court, Nassau County, asserting claims under, *inter alia*, the Commerce Clause, the Equal Protection Clause, and 42 U.S.C. § 1983, and seeking to set aside the Commissioner's determination and remove the self-imposed PCS permit restriction. Following removal of the matter to the Appellate Division, Second Department, pursuant to New York Civil Practice Law and Rules §7804(g), that court upheld the Commissioner's determination in a Decision and Judgment dated March 16, 1998. The Appellate Division found that the Commissioner's determination was supported by substantial evidence in the record and that petitioners' other contentions, implicitly including their fully briefed Commerce Clause and equal protection claims, were "without merit" (Pet. 1a-3a).

The New York State Court of Appeals denied petitioners' motion for leave to appeal by order dated July 9, 1998. (Pet. 124a). Mt. Hope subsequently filed a petition for a writ of certiorari which was docketed by this Court on October 8, 1998.

ARGUMENT

IN THE ABSENCE OF A SUBSTANTIAL CONSTITUTIONAL ISSUE OR ANY CONFLICT BETWEEN THE DECISION OF THE APPELLATE DIVISION AND THE DECISIONS OF THIS COURT OR THE FEDERAL COURTS OF APPEAL, NO REASON EXISTS FOR THE GRANT OF A WRIT OF CERTIORARI IN THIS MATTER

The petition for certiorari should be denied because it fails to raise a substantial constitutional issue worthy of this Court's review and raises no conflict between the decision of the Appellate Division and the holdings of this Court or other

Federal courts. On the contrary, the Commissioner's determination in the instant matter, subsequently confirmed by the Appellate Division, correctly denied petitioners' permit application on ground which petitioners have conveniently failed to address in their petition -- that Mt. Hope had falsified records, failed to disclose the source of its production materials, and demonstrated unsuitability to conduct the activities authorized under the permit (Pet. 7a-11a). Moreover, the PCS limitation here challenged was originally proposed by petitioners to advance their own purposes, was set forth in a temporary permit which has long expired, and had a negligible effect on interstate commerce. Finally, petitioners' constitutional claims are barred by relevant statutes of limitations.

The record in this matter clearly demonstrates that the permit requirement calling for Mt. Hope to utilize PCS only from sites assigned a NYSDEC Spill Number, inserted at petitioners' written request and characterized by petitioners in their permit application as a "self-imposed condition" (A239, 243, 249, 259), was designed to address the State's concern that only soil contaminated with virgin petroleum and no other hazardous substances be utilized in petitioners' asphalt production process (AT1452-1454). Such a business decision by an experienced corporation, designed to minimize its costs of ascertaining and demonstrating the quality of its materials, represents a voluntary, knowing, and intelligent waiver of any conceivable claim to use of out-of-state material and raises no constitutional concerns. *See, Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (circumstances evidencing an "intentional relinquishment of a known right or privilege" constitute waiver); *Faretta v. California*, 422 U.S. 806, 835 (1975).

Contrary to petitioners' contention (Pet. 8), this case does not involve flow control laws comparable to those in *C. & A. Carbone v. Town of Clarkstown*; nor does it involve discrimination against environmentally sensitive materials

originating beyond a state's borders (Pet. 12). New York State has neither statute nor regulation nor policy prohibiting the importation of out-of-state PCS. Nor does the State bar use of out-of-state PCS in asphalt production. Indeed, petitioners concede that New York has granted at least one permit for PCS originating in New Jersey (Pet. 18-19) -- provided that the source of the PCS had been inspected by the New Jersey Department of Environmental Protection. As long as the permittee could reasonably show that the PCS contained only virgin petroleum and was not contaminated by other hazardous substances, its use might be permissible without regard to its state of origin.

In any event, petitioners' Commerce Clause and equal protection challenges to NYSDEC's issuance of the August 1991 permit, raised for the first time at the commencement of this proceeding and action in November 1995, were time-barred under even the longest state law statute of limitations conceivably applicable to such claims. *Wilson v. Garcia*, 471 U.S. 261 (1984) ("most appropriate" period of limitations provided by state law must be applied in Section 1983 actions); New York Civil Practice Law and Rules § 214 (three year statute of limitations to recover damages for injury to property); *see also,* New York Environmental Conservation Law §19-0511(2)(b) (60-day statute of limitations for challenges to permit conditions); *Bitondo v. State of New York*, 182 A.D.2d 948, 950-51 (3d Dept. 1992)(same).

Moreover, the PCS limitation contained in petitioners' temporary license imposed, at the very worst, a small and incidental burden on interstate commerce that is unworthy of this Court's review. It is well established that the Commerce Clause is not violated by a restriction which serves an important public health purpose and poses a relatively small incidental burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1969). This Court has consistently recognized

that "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1985) (citation omitted). State regulations that "burden" interstate transactions only incidentally raise Commerce Clause concerns solely if such burdens are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, at 142. In the instant matter, the self-imposed limitation on use of in-state PCS, intended by a single manufacturer to allow that State to ascertain the quality of their production materials, had a minimal effect on commerce and a substantial public benefit, and presents no matter of constitutional concern. Significantly, there is nothing in the record to suggest even remotely that NYSDEC would have been indisposed to adopt any alternative effective method of assuring PCS quality.

Finally, petitioners have conceded explicitly that the record in this matter does not support their claim under the Equal Protection Clause (Pet. 5, 16). Indeed, evidence in the record demonstrates that the State treated Mt. Hope in the same manner as other similarly situated asphalt producers: granting permits to the extent that the permittee could reasonable show that the PCS was not contaminated with other hazardous substances.

In sum, the agency determination in this matter, and the Appellate Division holding confirming that determination, were eminently correct in all respects; petitioners' constitutional claims were properly dismissed; and this matter raises no issues worthy of this Court's review.

CONCLUSION

The Petition For a Writ of Certiorari Should Be Denied.

Dated: New York, New York
November 6, 1998

Respectfully submitted,

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(3)

No. 98-595

FILED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

MT. HOPE ASPHALT CORP. a/k/a MOUNT HOPE ASPHALT CORP. and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

vs.

MICHAEL ZAGATA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

REPLY BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

Petitioners, Mt. Hope Asphalt Corp. and Frank Petrosky, submit this Reply Brief solely to correct the misstatements and misapprehensions which the Respondent, State of New York, has created in its brief in opposition to the Petition for Writ of Certiorari. Regrettably, instead of addressing what Mt. Hope asserts are serious and compelling constitutional questions as to the State's alleged violations of the Interstate Commerce Clause and the Equal Protection Clause of the United States Constitution (as to which the State's Brief contains but a two-paragraph response), the apparent thrust of the State's Brief is to assassinate the character of Mt. Hope by alleging that it falsified records, concealed information and demonstrated unsuitability to conduct its recycling activities. While these charges were in fact litigated before the Administrative Law Judge in a two-week trial, the record speaks for itself: the ALJ concluded that Mt. Hope had caused no harm to the environment; had maintained logs accurately reflecting the sources of out-of-state petroleum-contaminated soil (PCS); had made no attempt to conceal these out-of-state shipments from State inspectors; and had seen to it that all out-of-state shipments of PCS satisfied all of the governmental Quality Assurance/ Quality Control requirements of Mt. Hope's permit.

The State's misdirected emphasis upon Mt. Hope's alleged wrongdoing, and lack of attention to Mt. Hope's constitutional issues, combine to illustrate the weakness of the State's legal position on this Petition. It is respectfully urged that the Petition be granted and that Mt. Hope be afforded the opportunity to brief fully the Supreme Court on its significant constitutional claims.

In this Reply Brief, Mt. Hope will first reply to Respondent's erroneous counter-statement of the case, and then reply to the State's specious legal argument.

REPLY TO COUNTER-STATEMENT OF THE CASE

The most egregious misstatement by the State of New York is that Mt. Hope included in its application a "self-imposed condition" by which it restricted itself to accepting only New York PCS, *i.e.*, soil which could be identified by a spill number. Brief in Opp'n at 3. The New York State Department of Environmental Conservation ("NYSDEC") claims that this condition was proposed by Mt. Hope in order to assure NYSDEC that the petroleum contaminated soil used in Mt. Hope's asphalt production process "was contaminated only with virgin petroleum and no other contaminants." *Id.* Thus, claims the State, Mt. Hope "waived" any constitutional claim it might otherwise have had.

NYSDEC misstates the facts. In spite of the statement that such a "self-imposed condition" appeared in Mt. Hope's application, Mt. Hope never proposed such restriction. NYSDEC's reference to the so-called "self-imposed condition" language is presented out of context, and appeared not in Mt. Hope's application, but in an engineering report prepared by Disposal Technologies and Impact Environmental submitted during the application process. The engineering report's overview included the following statement erroneously attributed to Mt. Hope and erroneously referenced as a restriction against all but in-state PCS:

> Disposal at the Mt. Hope facility will enable the New York Department of Environmental Conservation to fully regulate all aspects of material transport and disposal. What enables the DEC to have this control is an elaborate, *self imposed* sampling, analysis, transport and reporting protocol. This protocol provides a long series of checks and balances on management activities which can be

> easily and accurately monitored by the DEC on a continuous basis.

(A243, cited at Brief in Opp'n at 3 (emphasis added).)

A close reading of the subject engineering report reveals that Mt. Hope's "*self-imposed sampling, analysis, transport and reporting protocol*" did not include any restriction or representation that Mt. Hope would utilize only PCS originating in New York. The engineering report does, however, provide that pre-qualification procedures including detailed sampling and analysis would ensure that all materials would be non-hazardous within the meaning of the Resource Conservation and Recovery Act. (A255.) Nowhere does the State claim that Mt. Hope violated this requirement.

Similarly, as set forth fully in Mt. Hope's brief to the New York Supreme Court's Appellate Division, NYDEC's representation that assignment of spill numbers was a critical safety element of the manufacturing process is totally unsupported by the record. The record, in fact, is abundantly clear that no safety function was ever served by the spill number, and no deception or environmental harm resulted from the use of PCS which did not have a New York spill number.[1]

---

1. NYSDEC's compliance officer testified that he did not know whether a spill number in any way indicated whether the spill involved hazardous or a non-hazardous material; that spill numbers were issued simply on the basis of a telephone call rather than an inspection (AT 1526-1527); and that the source of origin of the PCS — whether from New York or any other state — was irrelevant as far as air omissions were concerned. (AT 1528-1529.)

Testimony further dispelling the myth of the spill number's significance came from another NYSDEC witness, Richard Parish, who testified that while a spill number could be used to identify the location

(Cont'd)

The record also reveals that NYSDEC knew that Mt. Hope was processing out-of-state PCS because, in compliance with its EP2 permit, Mt. Hope's log books contained entries indicating that Mt. Hope received and processed PCS from New Jersey. (A650.) The record is clear that these log books, as well as individual reports for each shipment of soil received by Mt. Hope, were on file at Mt. Hope's offices at all times, where they could be reviewed and where, in fact, they were reviewed on numerous occasions by NYSDEC inspectors. (T 124, ln. 3-5 - T125 ln. 12; T 141, lns. 20-24; T 354 ln. 23 - T 355 ln. 25; T 362, ln. 21 - T 363 ln. 5; A 125.) Upon review of the same logs, Judge Weber of Suffolk County Court held that charges against Mt. Hope were unfounded and noted that "any reasonable and literate examiner of the documents could not have been deceived. . . ." *People v. Mt. Hope*, 167 Misc. 2d 517 (Suff. Cty. Ct. 1995).

Thus, in spite of the State's erroneous representations that Mt. Hope's application contained a self-imposed restriction to in-state PCS, and that it "falsified records, failed to disclose the source of its production materials and demonstrated unsuitability to conduct the activities authorized under the permit" (Brief in Opp'n at 6), the record says otherwise. The record establishes that Mt. Hope never represented or understood that such a restriction applied; that it did not violate its permit; and that the DEC was never deceived. It knew and approved, or certainly acquiesced, in Mt. Hope's processing of New Jersey PCS, and with good reason: there was no sound environmental reason not to do so.

(Cont'd)
of a spill, Mt. Hope's pre-qualification chemical analysis determined whether soil could properly be brought into the facility. (AT 2373-2376.) In point of fact, Mr. Parish conceded on the record that New Jersey had more stringent controls than New York and that Mt. Hope had never proposed that it be restricted to receiving soil only from the State of New York. (AT 2377-2378.)

For all of these reasons, New York's contention — that Mt. Hope agreed to a self-imposed condition limiting its process to New York PCS — is contrary to the record this case and cannot constitute, as speciously proffered by the State, an "intentional relinquishment of a known right or privilege" under *Faretta v. California*, 422 U.S. 806, 835 (1975). As a result, Mt. Hope's constitutional claims must be addressed, and if addressed by this Court, should result in a reversal of the lower courts herein.

I.

MT. HOPE'S COMMERCE CLAUSE AND EQUAL PROTECTION ISSUES WARRANT THE ATTENTION OF THIS COURT.

In Mt. Hope's Petition for Writ of Certiorari, it has compellingly stated its Commerce Clause and Equal Protection arguments which warrant being addressed by the nation's highest court. Those arguments will not be repeated here. What is startling, however, is the short shrift which the State of New York gives to these significant issues — issues which it would like the Court to conclude either pose a "relatively small, incidental burden on interstate commerce" or are non-existent (because all recyclers of PCS have allegedly been treated the same). Nothing could be further from the truth.

A. The Commerce Clause Violation

New York has conceded that its restriction on Mt. Hope's ability to use out-of-state PCS constitutes a burden on interstate commerce (Brief in Opp'n at 7). The only question left, then, it whether such a burden is, as contended by the State, a "relatively small, incidental" one, or whether it is of such significance as to warrant intervention by this Court. Let it be clear that it is of great significance to Mt. Hope, which has been shut down as a

result of these violations of its constitutional rights. It should be of like significance to this Court, as well, because to allow this prohibition to stand will signal to the States that they can with relative impunity burden interstate commerce in this manner. This has nothing to do with a State regulating matters of "legitimate local concern" (*Maine v. Taylor*, 477 U.S. 131, 138 (1985)), and the burden is "clearly excessive in relation to the putative local benefits" (as to which there are none). *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Most pointedly, at the conclusion of its one-paragraph argument on the Commerce Clause issue, the State asserts:

> Significantly, there is nothing in the record to suggest even remotely that NYDEC would have been indisposed to adopt any alternative effective method of assuring PCS quality.

(Brief in Opp'n at 8).

The record is replete with proof that the PCS from New Jersey was in all respects of like quality to that from New York; that New Jersey had more stringent standards for QA/QC; that the PCS was only contaminated, as it should have been, with virgin petroleum product; and that Mt. Hope caused no environmental harm whatsoever by its recycling and processing of New Jersey PCS. New York State was never disposed to *any* alternative method of assuring PCS quality. It claims to have barred New Jersey PCS; it has put Mt. Hope out of business because it recycled New Jersey PCS; and this violation of Mt. Hope's constitutional rights under the Interstate Commerce Clause and the Equal Protection Clause should be recognized by this Court.

B. The Equal Protection Violation

Even more startling is the two-sentence argument which the State of New York makes in opposition to Mt. Hope's

claimed violation of the Equal Protection Clause (Brief in Opp'n at 8). The gist of New York's argument, without support or authority, appears to be that it treated Mt. Hope similarly to all other asphalt recyclers, this despite the acknowledgment that it allowed at least one of Mt. Hope's competitors to recycle New Jersey PCS. It is respectfully submitted that New York has acknowledged Mt. Hope's *prima facie* case regarding the violation of its equal protection rights, which violation cries out for redress from this Court.

CONCLUSION

As is clear from its Brief in Opposition to Mt. Hope's Petition, the Respondent State of New York has taken the untenable position that if it does not like a particular permittee, it can trample upon its constitutional rights with impunity, and hide these transgressions behind unfounded charges of character unfitness. After twenty-five years of operation without incident, Mt. Hope has now been shut down for over five years, a situation which begs for the attention of this Court.

For all of the above reasons, it is respectfully requested that Mt. Hope's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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